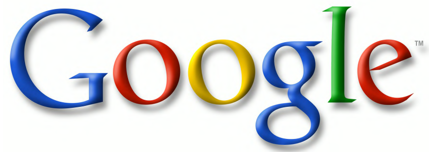

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TEXAS CRIMINAL REPORTS

CASES ARGUED AND ADJUDGED

IN

THE COURT OF CRIMINAL APPEALS

OF

THE STATE OF TEXAS

DURING

JANUARY, FEBRUARY AND MARCH, 1913

REPORTED BY
RUDOLPH KLEBERG

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1914

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TEXAS CRIMINAL REPORTS

JANUARY, 1913.

O. L. Whorton v. State.

No. 2037. Decided January 8, 1913.

1.—Forgery—Reproduction of Testimony—Permanent Removal.

Where, upon trial of forgery, a sufficient predicate was laid for the reproduction of the testimony of an absent witness who had permanently removed from the State, there was no error. Following Connery v. State, 23 Texas Crim. App., 378, and other cases. Davidson, Presiding Judge, dissenting.

2.—Same—Rule Stated—Absent Witness.

When it is once shown that a witness had permanently removed beyond the jurisdiction of the court, it is not necessary to show his exact whereabouts on the day of the trial. Following Smith v. State, 66 Texas Crim. Rep., 593. Qualifying Ripley v. State, 58 Texas Crim. Rep., 489.

3.—Same—Evidence—Exculpatory Statements—Confessions.

The statutes governing the admissibility of confessions made under arrest do not apply to nor include statements which are wholly exculpatory, even though the State should introduce other evidence showing that such exculpatory statements are false. Following Ferguson v. State, 31 Texas Crim. Rep., 93. Distinguishing Morales v. State, 36 Texas Crim. Rep., 234.

4.—Same—Case Stated—Confessions—Arrest.

Where the exculpatory statement was that defendant had not been in the place at the time the alleged offense was committed, the same was not a confession required to be in writing when defendant was under arrest; besides, the facts showed that he did not know he was under arrest, and that he afterwards made a written statement which complied with the statutes as to confessions under arrest which was the same in substance as his exculpatory oral statement, and there was no error. Following Martin v. State, 57 Texas Crim. Rep., 264, and other cases. Davidson, Presiding Judge, dissenting.

5.—Same—Evidence—Signature.

Where, upon trial of forgery, while a State's witness was testifying that he did not write his name on the back of the alleged forged check, the court permitted him to write his name on a slip of paper in the presence of the jury, but the jury did not see the signature and the paper upon which it was written was excluded from the consideration of the jury, there was no error.

6.—Same—Circumstantial Evidence—Check.

Upon trial of forgery, there was no error in introducing in evidence, as a circumstance, that the party whose name was alleged to be forged had given defendant another check upon the same bank, to trace knowledge to the defendant that the said party did his banking business with said bank. Following Noftsinger v. State, 7 Texas Crim. App., 301, and other cases.

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7.—Same—Charge of Court—Defendant's Declarations—Exculpatory Statements—Alibi.

Where, upon trial of forgery, the court admitted in evidence the exculpatory statement of defendant that he was not in the place where the alleged forged check was passed at the time it was passed or forged, as claimed by the state, and such statement did not contain any inculpatory fact, and the court charged on alibi, there was no error in refusing a special charge that the State was bound by said statement of defendant unless disproved by the evidence. Following Trevenio v. State, 48 Texas Crim. Rep., 207, and other cases. Davidson, Presiding Judge, dissenting.

8.—Same—Indictment—Words and Phrases.

Where, upon trial of forgery, the indictment followed approved precedent, the fact that "A. D." was left out just before the year "1911," was immaterial and the indictment was sufficient.

9.—Same—Indictment—Endorsement.

Where the endorsement on the alleged forged check was made at the bank where it was cashed, at the banker's request, it was not necessary to allege such endorsement in the indictment. Following Crayton v. State, 47 Texas Crim. Rep., 88, and other cases.

10.—Same—Evidence—Comparison of Handwriting.

Upon trial of forgery, there was no error in admitting in evidence certain letters found upon defendant which were in the handwriting of the defendant, as standards of comparison with the writing in the forged check Hughes v. State, 59 Texas Crim. Rep., 294, and other cases.

11.—Same—Evidence—Declarations of Defendant—Charge of Court—Invited Error.

Where the declarations of defendant applied to the charge of forgery against the defendant and were thus limited by the charge of the court, the contention of defendant that he was not informed that he was also charged with passing a forged instrument are not well taken, and there was no error; besides, the court's charge was invited by a requested charge by defendant. Following Carbough v. State, 49 Texas Crim. Rep., 452.

12.—Same—Practice on Appeal—Charge of Court.

Where defendant was indicted for forgery and passing a forged instrument, but tried and convicted of forgery, objections relating to the charges of the court as applied to passing a forged instrument need not be considered.

13.—Same—Charge of Court—Sufficiency of the Evidence.

Where, upon trial of forgery, the evidence was sufficient to support the conviction, and the requested charges were either given or covered by the court's main charge, there was no error.

Appeal from the District Court of Parker. Tried below before the Hon. J. W. Patterson.

Appeal from a conviction of forgery; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Hood & Shadle, for appellant.—On question of insufficiency of indictment: Robinson v. State, 43 S. W. Rep., 526; Overly v. State, 31 S. W. Rep., 377; Com. v. McLoon, 66 Am. Dec., 354.

On question of permitting other checks in evidence: Chester v. State, 23 Texas Crim. App., 577.

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On question of permitting witness to write his name: Whittle v. State, 43 Texas Crim. Rep., 468; McGlasson v. State, 37 id, 620; Haynie v. State, 2 Texas Crim. App., 168; Thomas v. State, 18 id, 213.

On question of admitting declarations of defendant: Nolen v. State, 9 Texas Crim. App., 419; Williams v. State, 10 id, 526; Bennett v. State, 25 id, 695.

On question of reproduction of testimony: Evans v. State, 12 Texas Crim. Rep., 370; Martinas v. State, 26 id, 91; Pinkney v. State, 12 id, 352; Menges v. State, 21 id, 413; Cooper v. State, 7 id, 194; Cowell v. State, 16 id, 57.

On question of refusing special charge on exculpatory testimony: Pharr v. State, 7 Texas Crim. App., 472; Jones v. State, 29 id, 20; Pratt v. State, 50 id, 227; Combs v. State, 55 Tex. Crim. Rep., 334; 108 S. W. Rep., 649; Baggett v. State, 65 Tex. Crim. Rep., 425; 144 S. W. Rep., 1136.

On question of court's failure to charge on confessions applicable to passing a forged instrument: Ewing v. State, 29 Texas Crim. App., 434; Martin v. State, 38 Texas Crim. Rep., 285.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—In this case appellant was prosecuted and convicted of forgery, and Presiding Judge Davidson has written an opinion reversing and remanding the case on several grounds, in none of which do we concur, but think the case should be affirmed.

We will first discuss those grounds upon which our Presiding Judge in his opinion thinks the case should be reversed. The first is, that no sufficient predicate was laid to admit the reproduction of the testimony of the witness Bryant, who had testified upon a former trial of this case. We think a sufficient predicate was laid and there was no error in admitting the testimony. The witness J. H. Erwin testified that he knew Bryant; that Bryant was a married man, and he was with him the day he and his family left for Georgia and shipped his household goods, and he knew he was moving from this State to Georgia. That he heard from him after he arrived at Talmon, Georgia; that Bryant had written him from that place and sent him a money order as he had promised to do. The testimony of this witness shows that Bryant moved permanently from Texas to Georgia, and instead of the authorities holding that such proof is not a sufficient predicate, we think they hold to the contrary. A careful reading of the opinions cited by our Presiding Judge will show that a permanent removal from the State, when shown, will admit the testimony, while a temporary absence will not, and in these views we cordially concur. But in this case a permanent removal was shown, and the court did not err in admitting the testimony. The authorities so hold: Conner v. State, 23 Texas Crim. App., 378; Evans v. State, 12 Texas Crim. App., 370; Pinkney v. State, 12 Texas Crim. App., 352; Garcia v. State, 12 Texas Crim. App., 335;

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Johnson v. State, 1 Texas Crim. App., 333; Post v. State, 10 Texas Crim. App., 579; Johnson v. State, 26 Texas Crim. App., 640; Parker v. State, 24 Texas Crim. App., 61; Peddy v. State, 31 Texas Crim. Rep., 547; Gilbreath v. State, 26 Texas Crim. App., 315. Many other cases could be cited, but they all adhere to the holding that when a witness is shown to have permanently removed beyond the jurisdiction, the evidence is admissible; otherwise when his absence is only temporary, and in this case the evidence shows that the removal was permanent, and when it is once shown that a witness has permanently removed beyond the jurisdiction of the court, it is not necessary to show his exact whereabouts on the day of the trial. To place such a burden on the State or defendant woud in effect exclude the testimony in almost every instance. We had the question before us in the case of Smith v. State, 66 Tex. Crim. Rep., 593; 148 S. W. Rep., 722, and there discussed it at length, and we adhere to the rule there laid down. This holding is not in conflict with any of the decisions cited in the opinion of our Presiding Judge, when read and digested in the light of the facts in those cases, unless it be the case of Ripley v. State, 58 Texas Crim. Rep., 489, and if this case is subject to the construction given it by our presiding judge in this case it is hereby overruled, and the rule declared to be as stated by Judge Hurt in Post v. State, 10 Texas Crim. App., 579; by Judge Simkins in Peddy v. State, 31 Texas Crim. Rep., 547; by Judge White in Conner v. State, 23 Texas Crim. App., 78, and by all the other judges who have occupied a position on this court and our Supreme Court, (except in the Ripley case, supra,) and that is, where the testimony shows by circumstances or positive evidence that the witness has moved permanently beyond the jurisdiction of the court, the testimony may be reproduced.

Neither can we agree with the opinion of the Presiding Judge that the testimony of the witness Barney Barker, as to what appellant told him, is inadmissible. The statement was an exculpatory statement, and not a confession. Barker testified: "When I called the defendant off there I asked him when was the last time he was in Weatherford, and he said he had not been in Weatherford since—I am not positive now whether the last day in March or the first Monday in March, but one or the other was the last time he had been here. Then I asked him if he had been here yesterday and he said no, he was not here since—either the last day of March or the first Monday in March. That was the day after the check was passed on the bank." The contention of the State was that defendant was in Weatherford and not in Fort Worth on this date, and in order for the State to obtain a conviction it would be necessary to prove that he was in Weatherford. So this statement would be wholly exculpatory, and in no sense a confession of guilt; therefore, it would not come within the rules of the statute relating to confessions. Mr. Bouvier in his Law Dictionary defines a confession: "The voluntary declaration made by a person who has committed a crime to another of the agency or particupation which he

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had in the same. An admission or acknowledgement by a prisoner that he committed the crime with which he is charged." In Cyc., vol. 8, page 562, a confession is thus defined: "The acknowledgement of some fact, of a fault or wrong, or of an act or obligation adverse to one's reputation or interest; an admission of something done antecedently. At common law an admission of a cause of action. In criminal law, a voluntary statement made by a person charged with the commission of a crime or misdemeanor, communicated to another person, wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act, or the share and participation which he had in it; the voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation he had in the same; a person's declaration of his agency or participation in a crime; an acknowledgement of guilt; the acknowledgement of a crime or fraud." In this work are cited many authorities, among which is People v. Miller, 122 Cal., 84, wherein the Supreme Court of that State said: "In our law the term admission is usually applied to civil transactions, and to those matters of fact in criminal cases which do not involve criminal intent; the term confession being generally restricted to acknowledgement of guilt," citing Greenleaf Ev., Sec. 170.

In the Am. & Eng. Ency. of Law, vol. 6, p. 521, the definition is thus given: "A confession is a voluntary admission or declaration by a person of his agency or participation in a crime.

"The term 'confessions' is not the mere equivalent of the words 'statements' or 'declarations.' A statement or declaration to amount to a confession must be inculpatory and not exculpatory in its nature. Thus statements made by persons indicted together for the same offense, by which each charges the other without inculpating himself, and makes no reference to anything done in common as charged, are not confessions.

"Confessions as distinguished from admissions are acknowledgements of facts criminating in their nature, and not mere declarations against interest.

"Moreover, a confession is limited in its precise scope and meaning to the criminal act itself. It does not apply to acknowledgements of facts merely tending to establish guilt, since a damaging fact may be admitted without any intention to confess guilt. These are criminating admissions rather than confessions." Under this text are cited authorities from almost every state in the Union.

In Words & Phrases the word "confession" is said to mean: "A 'confession' is a person's declaration of his agency of participation in a crime. The term is restricted to acknowledgements of guilt. A confession is limited in its precise scope and meaning to the criminal act itself. It does not apply to acknowledgements of facts merely tending to establish guilt, since a damaging fact may be admitted without any intention to confess guilt. These are criminating admis-

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sions, rather than confessions. Where a person only admits certain facts from which the jury may or may not infer guilt, there is no confession." On pages 1418 and 1419, vol. 2, will be found a long list of authorities supporting this text.

We have cited these authorities, for in our own decisions there is some conflict. Some cases hold that exculpatory statements are included in the statute governing the admissibility of confessions, while in a number of other cases the law is held as announced in the above authorities. Our present Presiding Judge in a well-considered case announced the law in accordance with these decisions. In the case of Ferguson v. State, 31 Texas Crim. Rep., 93, he said:

"The statute, article 750 of the Criminal Procedure, relates to confessions only, and does not extend to nor include within its meaning and provisions statements exculpatory of the defendant. A confession is inculpatory evidence, which connects or tends to connect the defendant, either directly or indirectly, as a guilty participant in the offense charged. Quintana v. The State, 29 Texas Crim. App., 401; Willard v. The State, 26 Texas Crim. App., 126; Eckert v. The State, 9 Texas Crim. App., 105; Andrews v. The State, 25 Texas Crim. App., 339.

"The statement made by defendant did not admit his guilt, and was not so intended by him when he made it. It neither connected nor tended to connect defendant with the theft, but on the contrary, it was intended to exclude and rebut such inference. Instead of being an admission or confession of his guilt, it was intended as a denial of that fact. Same authorities.

"Such statements are made as well for the purpose of showing the absence of guilt as to manifest an innocent connection with the possession of the alleged stolen property by a defendant, and are intended to operate as exculpatory of guilt and crime. This character of evidence is elicited for the purpose of explaining the defendant's possession of the property, when his right thereto is called in question. While contradictory statements made by a defendant, as to his possession of property recently stolen, may be given in evidence, yet such statements have not been held to be 'confessions' of guilt under the statute. If such accounts are to be treated as confessions of guilt, it would not devolve upon the State to disprove them, as a prerequisite to a conviction, nor would the court be authorized or required to charge the jury that such account must be disproved in order to warrant a conviction. Eckert v. The State, 9 Texas Crim. App., 105." Many cases besides those cited in this opinion might be referred to but we deem it unnecessary, as the rule is so clearly so stated in the Ferguson case. However, in the case of Morales v. State, 36 Texas Crim. Rep., 234, the Quintana case in 29 Texas Crim. App., 401, and other cases holding that the *confessions of a defendant* made while under arrest, although not taken in conformity with the statute, were admissible, were overruled, but the

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court expressly limited its action to those instances where the statements offered were confessions of guilt, the court in the Morales case stating: "The matter inquired about in this case was a confession, and it is not necessary here to discuss the question involved in the cases above referred to as to whether the statements there made by the defendants were in the nature of a confession or not." In the Morales case the court only holding that a statement in itself of a confession of guilt was inadmissible if not taken in conformity with the statute, even though the defendant became a witness, pretermitting altogether a discussion of whether or not exculpatory statements were included in the statute governing admissibility of confessions. And yet in some instances this case has been sought to be used as excluding exculpatory confessions, when a careful reading of it will demonstrate it does not so hold. This question is again discussed in Parks v. State, 46 Texas Crim. Rep., 100, and it again held if the statements are inculpatory they are not admissible, and in some of the cases it may be said that the language used is broad enough to include exculpatory as well as inculpatory statements under the statute governing confessions, and because of these two conflicting line of decisions in our own court, we have made as thorough investigation of this question as the books at our command would permit, and we have come to the conclusion that the great weight of authority upholds the opinion of Presiding Judge Davidson in the Ferguson case, supra, and the statutes governing the admissibility of confessions do not apply to nor include statements which are wholly exculpatory, even though the State should introduce other evidence showing such exculpatory statements are false. That such is the correct rule we have no doubt, for the reasons for the adoption of a statute excluding confessions of guilt, except under given circumstances, cannot and in no sense do or would apply where a defendant makes a statement which, if true, would conduce to show his innocence. Mr. Chamberlayne, in his work on Modern Law of Evidence, vol. 2, beginning on page 1863, treats of this question at length, among other things saying:

"There is no branch of the law of evidence in such inextricable confusion as that relative to confessions. The general rule that a confession, a statement by one accused of crime directly or by necessary inference admitting his guilt, is receivable in evidence, provided it complies with certain requirements of procedure, is not questioned in any quarter. The difficulty with regard to the matter is, in large measure, due to the fact that an attempt is being made, in this connection, on certain alleged grounds of public policy, rigidly to maintain rules of procedure, as matters of substantive law, which are hard to sustain in point of reason. Just here has been, as it were, a fierce struggle in the law of evidence between the formalism of the past and the rationalism of the future. * * *

"It follows from the very definition of a confession that it must,

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as a total, incriminate the declarant, as to the crime charged in the indictment. It is not sufficient that the alleged confession should be a statement by one accused of crime admitting that he committed the overt act, if at the same time he sets up a justification, as self-defense, or other exculpation, so that, when the entire effect of the statement is regarded, it is exculpatory. Such a declaration as has been described while admitting a fact is, in effect, a denial of the liability legally arising from the existence of the fact admitted. It is not therefore a confession, and is accordingly admissible under conditions which would exclude an actual confession, i. e., an inculpatory statement." Under this text in Mr. Chamberlayne's work will be found collated an exhaustive list of authorities.

As the statement testified to by the officer was wholly exculpatory, the court did not err in admitting it. We have written at length on this proposition, as some of our decisions have used language that one could hardly tell whether exculpatory statements were included in the term "confession" as well as inculpatory statements, and as in our opinion only inculpatory statements are included, it necessarily follows that it is only when the statement is inculpatory in its nature it is inadmissible, unless it has been reduced to writing in accordance with the requirements of our Code. If the statement is wholly exculpatory, the State may introduce it as a circumstance in the case to be considered with the other evidence.

Again, in this case, we do not think the evidence would show that defendant had been apprised he was under arrest. The officer testified: "Wilson Crawford pointed the defendant out to me, and I walked down there where the defendant was; his father was standing there talking to some one else. I shook hands with the defendant and told him to come off, I wanted to talk to him a little bit, so we walked back towards the bank." The defendant asked permission to cross-examine the witness, and he testified: "I am an officer and was at that time. I had not told him that he was arrested. I just called him off there to talk with him. I had him in my custody or charge when I called him off to one side. If he had tried to escape I would not have permitted it. I had him in custody for the alleged charge for which he is on trial now." On re-direct examination he testified: "I had not then told him he was under arrest, nor had I said anything to him at that time about being under arrest. I called him off there to talk to him, to find out when he was here in Weatherford; had made no statement to him about what I wanted to see him for." There is nothing in the record to indicate that appellant knew that Mr. Barker was an officer, and the record discloses that nothing was said that would lead him to believe or in any way apprize him that he was under arrest, and the testimony for this reason would be admissible. Martin v. State, 57 Texas Crim. Rep., 264; Grant v. State, 56 Texas Crim. Rep., 411; Craig v. State, 30 Texas Crim. App., 619; Frye v. State, 66 Tex. Crim. Rep., 166; 146 S. W. Rep., 199. In

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addition to this, if by any construction of the language used by appellant, it could be held to be a confession of guilt, which we think is impossible, and if it could be held that he had been made aware that he was under arrest, yet in a few moments after the conversation with Mr. Barker, appellant, after he had been notified by the county attorney that he was under arrest, charged with forging this check and that any statement he might make could be used against him. makes the same statement to the county attorney in a more amplified form; it was reduced to writing and signed by appellant, and complies in every particular with the statute governing the admissibility of confessions. So in no event could the testimony of Mr. Barker present reversible error.

Again, we cannot agree with our Presiding Judge when he holds that the trial court committed error in permitting Bill Leatherwood to write his name on a slip of paper in the presence of the jury. The bill of exceptions shows by its recitals, it being bill No. 3, that when Bill Leatherwood was testifying, and had testified that he did not write his name on the back of the forged check, which our Presiding Judge correctly holds was permissible for him to do, the county attorney then asked him to write his name, and he did so; that it was then offered in evidence, but defendant objected, and the court did not permit such signature to be introduced in evidence, the bill reciting: "The jury did not see, examine nor use Bill Leatherwood's signature for any purpose." Under such circumstances we do not see how the jury could have used it as a "standard of comparison." The bill itself says the jury did not *see* the signature. The fact that it was written while the witness was testifying, but excluded by the court from their consideration when the defendant objected, would not authorize us to presume, in the face of the recitals of the bill itself, that they saw something the record says they did not *see, examine nor use for any purpose.*

Neither can we agree with our Presiding Judge in holding that the check given by Mr. Cockburn to appellant was inadmissible for the purpose for which it was admitted. While defendant objected on all the grounds stated in our Presiding Judge's opinion, yet if the check was admissible for any purpose, these objections would not exclude it. Our Presiding Judge correctly holds that Mr. Cockburn was properly permitted to testify that he had not written the forged check nor authorized any one else to do so, and he did so testify. No one disputed that fact; in fact, there is no contention in the record that Mr. Cockburn had in fact signed the check, the only contention of appellant being that he was not the person who forged the check. Therefore, the check could and would serve no purpose as a standard of comparison with a check that was in fact written by Mr. Cockburn. However, the check was admissible for another purpose. This was a case of circumstantial evidence. No one saw appellant forge the check, if he did do so. According to the State's evidence, appellant

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went to Weatherford on the 26th day of April, (and that he was in Weatherford on that day is conclusively shown to our minds by a number of witnesses) and went into the Club Restaurant for his dinner; that while in this restaurant he asked for a blank check on the First National Bank, and one was torn out of the back of the book and given him. This check book had been printed to be used by "Patrick & Sliger" and their names appeared thereon. No other place in the town had blank checks with "Patrick & Sliger's" names thereon, and the person in charge of the restaurant says "He had not given anybody else a check that day or any other day out of this First National Bank book,"—the Patrick & Sliger book. The forged check was presented to and cashed by the First National Bank, a short time after Mr. Crawford says defendant obtained this blank check from him. The bank officer who cashed the check says he was busy, and cannot positively identify the defendant as the person who presented the check for payment, and to whom it was paid, but he thinks he is the person. There are other circumstances in evidence, but these facts and circumstances are sufficient to show that it was permissible as a circumstance in the case to prove that Mr. Cockburn had theretofore given appellant a check, and he had cashed it at this bank, to trace to appellant knowledge that Mr. Cockburn did his banking business with the First National Bank, and that bank would cash checks signed in his name, and also that the person who signed Mr. Cockburn's name to the forged check had probably seen Mr. Cockburn's signature. All these were circumstances admissible in a case depending wholly on circumstantial evidence. In Noftsinger's case, 7 Texas Crim. App., 301, this court says: "In a case like the present one, depending wholly upon circumstantial evidence, the mind seeks to explore every possible source from which any light, however feeble, may be derived." (Cooper v. State, 19 Texas, 449; Barnes v. State, 41 Texas, 42; Hamby v. State, 36 Texas, 523; Black v. State, 1 Texas Crim. App., 368.) And in such cases the nature of the case in many instances demands a greater latitude in the presentation of the evidences of the circumstances than where a conviction is sought upon direct and positive testimony. (Ballew v. State, 36 Texas, 98; Preston v. State, 8 Texas Crim. App., 30; Bouldin v. State, 8 Texas Crim. App., 332; Grimmett v. State, 22 Texas Crim. App., 36; Simmons v. State, 10 Texas Crim. App., 131; McGuire v. State, 10 Texas Crim. App., 125. This has not only always been adhered to as the rule of decision in this court, but such is said to be the correct rule by Mr. Wharton in his work on Criminal Evidence, Sec. 877, where a long list of authorities will be found in the note.

We agree that our Presiding Judge may be correct in holding that the check and attendant circumstances would not probably have been admissible as a "standard of comparison" and the authorities cited by him would support that holding, but in this case it was not necessary for that purpose, could not have been useful for that purpose,

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and was not introduced for that purpose, as there was no contention that Mr. Cockburn signed the forged check. If there had been such a contention in the case, then its introduction might have been harmful, but as there was no such contention, it could not have been hurtful in that respect, and it was admissible as a circumstance in the case tending to shed light on whether or not appellant forged and passed the check on The First National Bank.

The only other question discussed by our Presiding Judge is the failure of the court to give the special instructions requested by appellant, as the State had introduced the statement of defendant wherein he claimed that he was not in Weatherford on the day the blank check was obtained from the Club Restaurant, filled out and presented to the bank for payment, but was in Fort Worth. The court charged the jury on alibi, instructing them: "Among other defenses set up by the defendant is what is known in legal phraseology as an alibi; that is, that if the offense was committed as alleged, then the defendant was, at the time of the commission thereof, at another and different place from that which such offense was committed, and therefore was not and could not have been the person who committed the same. Now, if the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the place where the offense was committed at the time of the commission thereof, you will find the defendant not guilty." This presented the issue specifically as made by appellant's statement, and they find against him. necessarily finding, in doing so, that the statement he made that he was in Fort Worth and not in Weatherford, was not true, and no other submission was necessary, and we are of the opinion the court did not err in refusing the special instructions asked in regard to this issue. The statement made by the defendant to the county attorney reads as follows:

"Weatherford, Texas, April 27, 1911.

My name is O. L. Whorton. The following is my voluntary statement made to Bernard Martin, County Attorney of Parker County, Texas, as to my connection with the offense of forgery of a check on G. W. Cockburn for $43.00 on the 26th day of April, 1911, in Parker Co., Texas, and I am making this voluntary statement to the said Bernard Martin after being told and warned by him that I did not have to make any statement at all, and after being told and warned by him that any statement that I might make in connection with said offense might be used as evidence against me upon the trial for the charge herein inquired about, and that the same could not be used as evidence for me on any such trial. About 10 o'clock yesterday I was with Dave Green; we were about 3 miles from Cresson. I think we were in Parker County. I am not sure we were in Parker County; it might have been Hood County. I had been working for Dave Green a week. I went to work for him yesterday was a week ago. I went to Fort Worth yesterday, the 26th of April. I got to

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Fort Worth about 1:30 o'clock. I went to Fort Worth yesterday from Dave Green's house in my own buggy. No one was with me. My buggy is at Fort Worth now. I paid by R. R. *fair* on the train this morning to Weatherford. I did not have time to get a ticket. The last time I was in Weatherford before today was the last day of March, 1911. I have seen Crawford, who worked at the Club Restaurant, lots of times. I have been in the said restaurant several times when Crawford was in there. I have seen him waiting on people in the restaurant a good many times. I have seen him in the restaurant enough to know him when I go in there. I have got my meals several times at the Club Restaurant this year. I know G. W. Cockburn, who lives about 3 miles south from Agnes. I have known him about 5 or 6 years. I worked for him some in March, 1911. Mr. Cockburn has paid me in checks and also in cash. I remember he paid me some time in Feb. or Jan. of this year with his check, and I cashed it myself over at the First National Bank here in Weatherford; it was drawn on said bank. I do not remember the amount. It seems like he paid me with a check once besides this time. I know Bill Leatherwood. I have known him about 10 years. I have been to his house. Dave Green did not pay me anything for my work this last week; he still owes me for all my work. I don't know when he is going to pay me. I don't know how much he is owing me for my work; there was nothing said about my pay. I wrote the names of G. W. Cockburn and Bill Leatherwood on the envelope which I had in my pocket, which was turned over to John Brown and Barney Barker. I think I wrote their names while standing there in the First National Bank this evening. I also done the marking and scribbling on the said envelope while at the bank or after I left the bank. No one asked me to write their names on the envelope. I believe I shook hands with Walter Bryant this morning in Fort Worth. I stayed with Carl Willoughby last night in Fort Worth—he is a street car conductor—1503 East 20th Street is his residence. I ate supper and breakfast at his house. I ate dinner yesterday on 13th Street in Fort Worth; I don't remember how much I paid for it.

"Tom Harris, constable at Cresson, paid me $3.00 Tuesday of last week. He is the last man that has paid me any money. B. F. Bone, at Cresson, paid me $2.00 or $3.00 week before last—he is a ranchman.

"I had all my money in silver yesterday when I left Dave Green's. I guess I had $8.00 or $10.00. O. L. Whorton.

"Witness my hand this the 27th day of April, 1911."

The State's contention was that appellant was in Weatherford until 3:30 the evening of the 26th, when he took an eastbound train and went to Fort Worth; that while in Weatherford, before taking the train for Fort Worth, he had put his horse and buggy in a feed-yard in Weatherford; gone to the Club Restaurant, eat his dinner, and obtained the blank check; that he then filled out the check in Mr. Cock-

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burn's name and cashed it at the bank, thereafter taking the train for Fort Worth. The State proved that when he left Dave Green's he said he was going to Weatherford, and left traveling in that direction; the State proved that his horse and buggy were placed in Bankhead's wagon yard in Weatherford by appellant on that day, and that his horse and buggy were not in Fort Worth; the State proved he eat his dinner on that day in the Club Restaurant in Weatherford, and obtained a blank check; he was seen in Weatherford on that day by a number of people who knew him; he was seen at the depot in Weatherford when the east-bound train arrived going to Fort Worth, and when arrested there was found on his person a receipt for railroad fare for an amount corresponding with the fare from Weatherford to Fort Worth. Many other facts and circumstances were introduced in evidence by the State, which showed the statement of appellant as to his actions and whereabouts on the 26th of April were wholly false. As in the statement of appellant there are no incriminating circumstances upon which the State could rely for a conviction, the court correctly submitted the only issue made by his exculpatory statement, and that was whether or not he was in Weatherford on the day of the transaction. This question has been frequently before this court, and it has always been held that it is only where there are both exculpatory and inculpatory statements in a confession, and the State relies alone on the *inculpatory statements* for a conviction, that this charge need be given as regards the exculpatory statements contained therein. In the case of Slade v. State, 29 Texas Crim. App., 381, in discussing this question, this court held, speaking through Judge Hurt: "In the Pharr case the trial court had submitted to the jury two charges relating to the confessions or statements of the accused, the last being calculated to neutralize the first; the first being correct and the last wrong. The charge rejected in this case is in the language of the correct one in Pharr's case. Now, it is not decided in the Pharr case that, though correct, such a charge must always be given, when requested, in every case in which the State introduces in evidence the admissions of the accused. This question was not before the court in the Pharr case. Under what circumstances must such a charge be given? This question is answered in Jones v. The State, ante, p. 20. When the State relies for conviction alone upon the admissions and confessions of the accused, and such confessions or admissions contain exculpating or mitigating matters, such a charge should be given. In this case the State did not rely upon confessions or admissions alone for conviction. These were introduced mainly for the purpose of impeaching the accused, who testified in the case." As hereinbefore stated, and as shown by the statement of appellant herein copied, there were no inculpatory statements upon which the State could rely for a conviction. It was introduced merely to show that appellant had not spoken the truth when first challenged about the matter, as a circumstance in the case to be

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considered by the jury for its worth, and Judge Hurt says under such circumstances no such charge is called for. In the case of Trevenio v. State, 48 Texas Crim. Rep., 207, this court held, speaking through Presiding Judge Davidson, in a case almost similar to this: "The statements were in the nature of an alibi, and exculpatory entirely, showing that he had not been in Texas, which was evidently made for the purpose of defeating the case on the question of limitation, or rather to induce the grand jury not to return the bill, on the theory that he had never been in Texas, for the indictment was not presented until more than five years after the alleged theft. In Slade v. State, 29 Texas Crim. App., 381, the same rule is endorsed, as announced in Jones' case, supra: but the court went farther, after stating the rule, and said: 'In this case the State did not rely upon confessions or admissions alone for conviction. They were introduced mainly for the purpose of impeaching the accused, who testified in the case. There was a large mass of evidence adduced by the State in rebuttal of these confessions and admissions.' In such state of case, the charge is not required. The Slade case is more in consonance with this case. There is not a criminative fact stated by appellant in his testimony before the grand jury. On the contrary, every word is entirely exculpatory and a complete denial of his connection with the transaction in any manner whatever; and that he was neither in Texas nor Guadalupe County in 1898, at the time of the theft, and had never been in Texas after he was a boy, until 1901. The court charged very fully in regard to the question of alibi."

In this case the court charged on alibi, and if that was a sufficient presentation of the issue in the Trevenio case, it certainly would be in this case. Many other cases could be cited, but we do not deem it necessary.

These are all the questions discussed by our Presiding Judge in his opinion as handed us, and at first we intended only to enter our dissent as to the two first propositions herein discussed, this opinion may seem a little irregular, for a thorough study of the case convinced us he was wrong in his conclusion and deductions on all the propositions and, therefore, necessarily wrong in his application of the law. And as we concluded the case should be affirmed, we will briefly notice the other questions.

The court did not err in refusing to quash the indictment. It is drawn in the form frequently approved by this court, and the form laid down by Judge White in his Penal Code in Sec. 882. In the section following 882 will be found a long list of cases collated. The fact that "A. D." was left out just before the year "1911" is immaterial and the criticism hypercritical.

The fact that the indictment did not allege that the check was endorsed "Bill Leatherwood," while the check was so endorsed when introduced in evidence, presents no error. The banker testified that when the check was presented to him it was not endorsed; it was a

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completed instrument without the endorsement. The endorsement was made at the bank at the banker's request. Crayton v. State, 47 Texas Crim. Rep., 88; Bader v. State, 44 Texas Crim. Rep., 184, and cases there cited.

The envelope found on appellant and the notations thereon were properly admitted, they being found in his possession. As were also the letters testified to by Miss McAllister. She stated she knew defendant's handwriting; that the letters were written by him to her, and such letters were properly admitted as standards of comparison with the writing in the forged check. Phillips v. State, 6 Texas Crim. App., 364; Williams v. State, 27 Texas Crim. App., 66; Hughes v. State, 59 Tex. Crim. Rep., 294; 129 S. W. Rep., 837.

The defendant objected to the introduction of the statement of appellant in evidence on the ground that while it showed on its face that he was informed that he was charged with forgery, yet appellant was not informed that he was charged with passing a forged instrument. As there were two counts in the indictment, the statement would be admissible as to the count charging him with forgery. The court stated he would admit the statement as to the count charging forgery, and in his charge limited the consideration of the jury of this statement to that count alone at the request of appellant, and as he was convicted of this offense, this presents no error. The complaint of the charge of the court in so limiting this testimony presents no error, for this paragraph of the charge is almost in exact language of a charge requested by appellant, and if it should be held to be upon the weight of the testimony, the error, if error it be, was invited by appellant, and he cannot be heard to complain. Presiding Judge Davidson discusses this question fully in Carbough v. State, 49 Texas Crim. Rep., 452, and collates the authorities so holding, and this has been the rule of this court since the rendition of that opinion.

The defendant being convicted of forgery, and not passing a forged instrument, we do not deem it necessary to discuss those parts of the motion relating solely to the charge as applied to passing a forged instrument. They could have had no effect or bearing on the jury in passing on the forgery count.

Two of the special charges requested by appellant were given, and the others, insofar as they were the law of the case, were fully covered by the court in his main charge.

The evidence amply supports the verdict, and the judgment is affirmed.

Since writing the above opinion, Presiding Judge Davidson has withdrawn his original opinion, and wrote again in this case, but we do not deem it necessary to add anything further.

Affirmed.

PRENDERGAST, JUDGE.—I concur.

DAVIDSON, PRESIDING JUDGE (dissenting).—I cannot agree with

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my brethren in the disposition of this case on several questions, some of which I deem unnecessary to discuss.

The State introduced what was intended to operate as a confession through the witness Barker, as it did also what purports to be a written confession under the statute, which is sufficiently shown in the majority opinion without reproducing here. These statements. without reviewing all of them, as shown by Barker's testimony and by the purported written confession introduced against appellant on the trial, were introduced against him, and while exculpatory on their face, in the main, yet they were introduced by the State as inculpatory, and as a basis for contradiction of appellant's statements by showing that the statements were false. This, of course, operated as incriminating evidence against him if his statements that he was in Fort Worth were proved to be false. It is a well recognized rule of decision in this State, and is thoroughly embedded in our jurisprudence, that where an explanation is given by the appellant, which would tend to exclude guilt, is used by the State as incriminating evidence by showing its falsity, it has been regarded as a confession or as incriminating. This means of producing a confession is familiar with the profession and the bench of Texas, and comes perhaps more often under the doctrine of reasonable explanation of possession of property which has been recently stolen. Such explanation is introduced by the State and then attacked by testimony showing it to be false, thus making it operate as a confession of guilt. By this means the State shows, or attempts to show, the fact that the defendant was manufacturing a defense and stating falsehoods about the transaction, and this being shown by the testimony, of course, the statement would operate as incriminating evidence in the nature of a confession. This is so thoroughly understood I think it unnecessary to discuss it at any length. That I am correct about this in this particular case is evidenced by the charge of the learned trial court, which was given in the following language: "The State offered in evidence what it claimed to be a confession of the defendant. This was offered as to the offense set out in the first three counts in the indictment, to wit: forgery. The same was not applicable to the fourth count in the indictment, to wit: knowingly and fraudulently passing as true a forged instrument, and it is not evidence as to the charge set out in said count, and you will not consider it as any evidence as to the charge set out in the fourth count, to wit: knowingly and fraudulently passing as true a forged instrument." The learned judge who tried this case below has the record of being a very learned, able and conscientious trial judge, with a record reaching back as long almost as any other trial judge in the State. He understood, as all the lawyers, I think, will understand, that the statements introduced by the State, that of Barker and the written confession of defendant, were treated as a confession and introduced as a confession, and the court so charged the jury, and in doing so he limited it to the three counts

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setting up forgery, and excluded the consideration by the jury of the fourth count, which charged him with knowingly and fraudulently passing as true a forged instrument. The jury evidently understood it as a confession, as did the trial judge, as evidenced by the above quoted charge given the jury. Then this being true, and having been so charged to the jury, it was a confession so far as the effect of it upon the jury is concerned. My brethren hold that it was not a confession, yet they fail to reverse because of the charge given by the court, and they hold the court did not err in failing and refusing to charge that if it was exculpatory, as my brethren claim it was in the opinion, that then unless the State proved it false the jury should acquit. The appellant to meet this matter and counteract as well as he could the charge of the court, requested the following instruction:

"You are charged that, the State having introduced in evidence statements of the defendant, which, among other things, contained statements to the effect that defendant was not in Weatherford, Texas, on the day of the alleged offense, then you are charged, that the whole of said statements are to be taken together, and the State is bound by them unless they are shown to be untrue by the evidence; and such statements are to be taken into consideration by the jury as evidence in connection with all facts and circumstances of the case."

Again, the trial court was requested to give this instruction: "You are charged that the State having introduced in evidence the statement of the defendant to the witness Barney Barker, to the effect that he was not in Weatherford, Texas, on the day of the alleged offense herein, is bound by said statement unless same is disproved by evidence; and, in this connection, you are charged that if you entertain a reasonable doubt of the presence of the defendant at the place where the offense, if any, is alleged to have occurred, at the time said acts, if any, were committed, and entertain a reasonable doubt that at any such time he may not have been elsewhere, the defendant is entitled to the benefit of that doubt, and the jury should acquit him."

The court not only refused these instructions, but gave the one above quoted, and informed the jury, in substance, that it was a confession, and limited that confession to the consideration of the facts by the jury to the counts charging forgery. How, under all these circumstances attending this trial, this evidence and these charges, it can be said the defendant had the law of his case fairly presented to the jury, I do not understand. It is met to some extent by my brethren, who seem to be of the impression that because the court charged the jury on alibi, that that was sufficient in these respects. If an alibi was all that was involved in it, there might be some color of strength in their statement, but that does not meet the exculpatory statements as contained by appellant. The authorities, as I understand them, sustain appellant in these matters. To correct these rulings of the trial court, especially in reference to the charge above mentioned, appellant requested and the court refused the requested

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instructions above set out. The State introduced this evidence from Barker, and the written confession as criminating testimony, and then introduced all the testimony they could find to show the falsity of his statement as indicative of appellant's guilt. The court's charge was error, as I understand the law, and it was also error to refuse the requested instructions under the long line of well considered cases. Pharr v. State, 7 Texas Crim. App., 472; Jones v. State, 29 Texas Crim. App., 20; Pratt v. State, 50 Texas Crim. Rep., 227; Combs v. State, 52 Texas Crim. Rep., 617; Baggett v. State, 144 S. W. Rep., 1136; 1 Greenlead on Evidence (9 ed.), Secs. 218, 219, 442, 443; 1 Bish. Cr. Pros., Secs. 1235, 1236. For many other cases see cases cited. These matters were properly saved in the court below and timely presented there and here.

From the standpoint of the State's evidence, the jury was warranted in finding that appellant was in Weatherford a part of the day until about say 3 or 3:30 o'clock in the evening. From the defendant's standpoint, and the statement introduced against him through Barker, and the purported written confession, he was not in Weatherford at all during the day, and these latter matters were all introduced by the State. They were exculpatory on their face, showed an impossibility for him to have passed the forged instrument or committed the forgery on the day indicated. Under all the authorities, so far as I know about, from any standpoint, if he was not in Weatherford on the day of the alleged forgery and passing the instrument, and the State relied upon the fact that he was there to prove his guilt, then having introduced evidence that he was not there, it was incumbent upon the court to charge the jury that the State must show the exculpatory matters false, otherwise the jury would acquit. It may be stated as a sound proposition, and the writer thinks it not debatable, if the action of the court probably brought about a more injurious verdict to appellant than would probably have otherwise occurred without such action, that action or ruling becomes reversible error. If the court had charged the jury as the law has been laid down in the decisions in Texas, the jury might have given appellant a much more favorable verdict, even an acquittal. If the jury had been instructed that the State must show this evidence false in order to secure a conviction, the jury might have found him not guilty. Wherever the ruling, being erroneous, leads, or probably leads, to a conviction, it is reversible error. Or concede the guilt of the defendant, if the action of the court is error and he received a higher punishment than the minimum, then the error is fatal and a reversal should occur. The accused is entitled to a fair trial under the rules of law. It is not sufficient that this court may think the defendant is guilty as a justification to set aside or override the well established principles of law or settled jurisprudence. I wish here to reproduce some observations of Judge Roberts, than whom no greater judge has ever occupied the bench in Texas or any state in the Federal Union

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His name has been a household word as a great judge wherever our jurisprudence is known, and in Texas it would be a useless consumption of words to eulogize his memory both as statesman and jurist. In Duncan v. Magette, 25 Texas, at page 245, this language, written by Judge Roberts, is found:

"Although the counsel on both sides rely upon the rules of law as respectively presented by them, it is obvious that the great argument, whether expressly developed or not, by which those rules are sought to be discovered, interpreted and enforced, consists in an appeal to the sense of justice of the court. The opinion of the court in this case does not yield to the force of that appeal. Having written it, I avail myself of the opportunity afforded by this application, to present my own views upon the foundation and force of this appeal to the sense of justice of the court, whether used as an influencing consideration, in interpreting and enforcing the rules of law, or directly urged as the basis of judicial action. *A frequent recurrence to first principles is absolutely necessary in order to keep precedents within the reason of the law.* (Italics mine.)

"Justice is the dictate of right, according to the common consent of mankind generally, or of that portion of mankind who may be associated in one government, or who may be governed by the same principles and morals.

"Law is a system of rules, conformable, as must be supposed, to this standard, and devised upon an enlarged view of the relations of persons and things, as they practically exist. Justice is a chaotic mass of principles. Law is the same mass of principles, classified, reduced to order, and put in the shape of rules, agreed upon by this ascertained common consent. Justice is the virgin gold of the mines, that passes for its intrinsic worth in every case, but is subject to a varying value, according to the scales through which it passes. Law is the coin from the mint, with its value ascertained and fixed, with the stamp of government upon it which insures and denotes its current value.

"The act of moulding justice into a system of rules detracts from its capacity of abstract adaptation in each particular case; and the rules of law, when applied to each case, are most usually but an approximation to justice. Still, mankind have generally thought it better to have their rights determined by such a system of rules, than by the sense of abstract, as determined by any man, or set of men, whose duty it may have been to adjudge them.

"Whoever undertakes to determine a case solely by his own notions of its abstract justice, breaks down the barriers by which rules of justice are erected into a system, and thereby annihilates law. (Italics mine.)

"A sense of justice, however, must and should have an important influence upon every well organized mind in the adjudication of causes. Its proper province is to superinduce an anxious desire to search out and apply, in their true spirit, the appropriate rules of law.

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It cannot be lost sight of. In this, it is like the polar star that guides the voyager, although it may not stand over the port of destination.

"*To follow the dictates of justice, when in harmony with the law, must be a pleasure; but to follow the rules of law, in their true spirit, to whatever consequence they may lead, is a duty. This applies as well to rules establishing remedies, as to those establishing rights. These views will, of course, be understood as relating to my own convictions of duty, and as being the basis of my own judicial action.*" (Italics mine.)

In thus stating the rules of law, drawing the distinction between abstract or substantial justice, if you please, no better statement has been made. If so it has not come under the observation of the writer, and the above quotation comes from the pen of the great Roberts. If he had not written anything else as an opinion than the above, or if his great mind had not thrown light upon any other page of judicial history, this quotation is enough to have immortalized his name and memory as a great judge. In these latter days, where the great principles and rules of law are sought to be diverted from their high office and position in the machinery of government, this language of Judge Roberts is peculiarly applicable. It is necessary to at least occasionally refer to the first principles of law, right and justice in order that the jurisprudence of our country may be kept pure and uncontaminated by strenuosity or other outside influences that seek to attack the citadel of liberty or bring about its fall. I do not know that anything could be added to what Judge Roberts said. I doubt if the precision, accuracy and strength of the proposition will ever be stated in finer language or in terser strength. It affords the writer pleasure occasionally to go back to first principles and see what the great fathers of our jurisprudence wrote and what they thought is meant by constitutional government in this country. This may be out of joint and harmony with the times, but it is right; and right, truth and justice in the end will prevail. I shall be content to agree with the great judges who have written along this line heretofore and let whatever of work, writing, and conviction of the right attributable to me in the judicial history of my country go hand in hand with the above quotation from Judge Roberts.

There is another question in the case that I believe ought to reverse the judgment, but my brethren have not thought so, and in order to reach that conclusion had to overrule some of the previous work of this court. The question I refer to is the reproduction of the evidence of a man named Bryant, who had on a former occasion testified in the case. The testimony was reproduced through the witness Erwin. He stated that he was constable who succeeded as such the absent witness Bryant; that he knew Bryant when he lived in Parker County, and heard from him on the 3rd of January. That Bryant left this country with his (witness') knowledge, and that when he went away he took his household goods and effects with him. Witness knew at

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the time Bryant left Parker County that he said he was moving out of the State; that Bryant so informed him, and further that he was going to some point in Georgia. That since Bryant left witness had received a letter from him through the mail. He said: "I am pretty sure this is his signature to the letter." He testified he had also received a money order from Bryant. The witness had never seen Bryant in Georgia, and had never seen him anywhere out of the State, but saw him the day he left; he was then in Texas. Quoting from him: "I do not know his whereabouts only by this letter and the money order, December 4, the date of this letter, and January 3, some four months ago. I do not know at this time where he is; could not swear that he is not in Texas at this time, or for the last month, or two or three months. All I know of his whereabouts is by the letter and by a money order I got. That was December 4 I got the money order, and then he wrote the other letter." This occurred about ten days after Bryant is supposed to have left the State, that he received the money order. This is the predicate and all the predicate introduced by the State as a basis for the reproduction of the testimony of the alleged absent witness Bryant. Under none of the authorities that have been called to my attention is this sufficient. It has always been held in all the cases that the bare fact that the witness was out of the State at the time of the second trial would not of itself be sufficient ground for admitting proof of his former testimony in a criminal prosecution, unless admitted by counsel. This proposition was asserted in Sullivan v. State, 6 Texas Crim. App., 319. In that case this language is found as a predicate: "He (the absent witness) was here for several months, to see after his brother, who was in jail, charged with murder. He was here from January until August of last year. He went away out of the State. I wrote a letter to the postmaster at Marion, Massachusetts, inquiring for Owen Dean. I got a reply, he says, saying that Dean was at Boston, Massachusetts. Among his friends and acquaintances it is generally understood that he is at Boston, Massachusetts. He said that Dean came here from Boston, Massachusetts." The court said this was not sufficient, and reversed the judgment in the Sullivan case. This rule has been followed in the other cases cited wherever the question has come. This proposition has been reasserted as late as Pace v. State, 61 Texas Crim. Rep., 436. See also Cooper v. State, 7 Texas Crim. App., 194; Martinas v. State, 26 Texas Crim. App., 91; Menges v. State, 21 Texas Crim. App., 413; Ripley v. State, 58 Texas Crim. Rep., 489. My brethren overrule the Ripley case, but they leave the others unimpaired. The writer wrote the opinion in the Ripley case. It was concurred in by Judge Ramsey. The Ripley case is but a reproduction of all the other cases decided in this State, and is in entire harmony with and based upon them. It would be useless to follow this further, my brethren having determined to overrule appellant's contention in this matter. I simply enter this as my dissent on the question.

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There is another question I might notice. My brethren hold that Barker did not have appellant under arrest at the time he had the conversation with him, which was produced before the jury. I shall reproduce Barker's testimony in this connection: "When I called the defendant off there I asked him when was the last time he was in Weatherford, and he said he had not been in Weatherford since—I am not positive now whether the last day in March or the first Monday in March, but one or the other was the last time he had been here. Then I asked him if he had been here yesterday and he said no, he was not here since—either the last day of March or the first Monday in March." The bill further recites Barker's testimony as follows: "I just called him off there to talk with him. I had him in my custody or charge when I called him off to one side. If he had tried in any way to escape I would not have permitted it; would not have allowed him to escape. I had him in custody for the alleged charge for which he is on trial now." This conversation occurred the day following that on which the check was said to have been passed on the bank. It is a little difficult some times to determine when a party is or is not under arrest, but under my understanding of the law as applicable to the statement of facts made by Barker, it is shown that appellant was under arrest. The bill shows he was not warned, the statements were not in writing, and are, therefore, inadmissible. The statements of appellant made to Barker on this occasion were used against him as incriminating facts in view of the whole testimony, and to impress the jury with the fact in the light of the other testimony of the State, that he was in Weatherford that day and not in Fort Worth; that is, that appellant was telling a falsehood about his not being in Weatherford. Therefore, it was evidence of guilt and incriminating in its nature. This being true, under our authorities, it was in effect a confession as much so as any fact that is incriminating when stated by the defendant under circumstances as regarded in that light of authority in this State and this under all the cases as I understand them. The admission of this testimony was error. Nolen v. State, 9 Texas Crim. App., 419; Binkley v. State, 51 Texas Crim. Rep., 54; and cases there cited; see also Patrick v. State, 74 S. W. Rep., 550. In the Patrick case it was said: "It is often a serious question of fact, as found in the records coming before this court, to ascertain at what point a prisoner making a statement may be considered under arrest. There are two rules which may be deduced from the authorities as being correct: First, if the party is under arrest, the confession should be excluded; and, second, if, by the acts and conduct of the officer, or those approaching or having the party in charge, he is led to believe he is under arrest, or in his own mind is conscious of being under restraint, then the confessions are inadmissible. If the officer is to be believed, then he states: "I had him in my custody or charge when I called him off to one side. If he had tried in any way to escape I would not have permitted it; would not

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have allowed him to escape. I had him in custody for the alleged charge for which he is on trial now."

There are other questions in the case that might be interesting to discuss which were detrimental to appellant, and in my judgment not legally in the case against him. Appellant may have been guilty of this matter; the jury thought so, and convicted him, but that ought not matter, if the questions presented to this court show such error as prevented a fair and legal trial, for in such case it is the duty of this court, as I understand the duties of appellate courts, to award him another trial that he may be tried under the rules of law. It is the only way I have been taught that a legal trial can be had or that legal justice can be attained. I do not believe appellant has had such a trial as is demanded by the law. He has invoked the rules of law, in my judgment, but in vain. I believe his contentions to be correct and right. I therefore cannot agree with my brethren. I think the judgment ought to be reversed and the cause remanded.

SAM ALEXANDER V. STATE.

No. 2076. Decided November 27, 1912.

Rehearing Denied January 8, 1913.

1.—Occupation—Selling Intoxicating Liquors—Local Option—Plea of Guilty—Motion for New Trial.

Where defendant contended that he did not know in entering his plea of guilty that he was charged with pursuing the occupation of selling intoxicating liquors in local option territory which was contested by the State, and the court heard testimony as to this issue on defendant's motion for new trial and found against him, there was no reversible error.

2.—Same—Withdrawal of Plea of Guilty.

While the defendant has the right to withdraw his plea of guilty at any time before the retirement of the jury, yet this question, under Article 938, Code Criminal Procedure, cannot be raised for the first time in the Court of Criminal Appeals where the defendant has not reserved same by bill of exceptions or motion for new trial in the court below. Distinguishing Noble v. State, 50 Texas Crim. Rep., 581, 99 S. W. Rep., 996.

3.—Same—Verdict by Lot.

Where the verdict was not arrived at by lot or chance, but was a compromise of differences arising between the jurors, it was not a verdict by lot and valid.

Appeal from the District Court of Comanche. Tried below before the Hon. J. H. Arnold.

Appeal from a conviction of unlawfully pursuing the occupation of selling intoxicating liquors in local option territory; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

J. P. Graham, for appellant.—Cited Noble v. State, 50 Tex. Crim. Rep., 581; 99 S. W. Rep., 996.

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C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant appeals from a judgment finding him guilty of pursuing the business or occupation of selling intoxicating liquors in prohibition territory.

The judgment in this case, among other things, recites: "This day this cause was called for trial and the State appeared by her district attorney, and the defendant Sam Alexander appeared in person and both parties announced ready for trial and the defendant Sam Alexander in open court in person pleaded guilty to the charge contained in the indictment, thereupon the said defendant was admonished by the court of the consequences of the said plea and the said defendant persisted in pleading guilty, and it plainly appearing to the court that the said defendant is sane and that he is uninfluenced in making said plea by any consideration of fear or by any persuasion or delusive hope of pardon prompting him to confess his guilt, the said plea of guilty is by the court received and is here entered upon the records of the court as the plea herein of said defendant."

There is in the record no bill of exceptions of any character, but the motion for new trial is sworn to, and is as follows: "His said plea of guilty was made by him under a misapprehension of the charge against him and of the circumstances of his arrest and prosecution in particular as follows: Defendant was arrested by the authorities of McLennan County, and without informing him of the particular charge against him defendant was delivered to the Sheriff of Comanche County, and by him placed in jail of Comanche County; on the 8th or 9th day of May, 1912, brought into this court and placed on trial, in which defendant entered his plea of guilty, but he shows to the Court that he had not seen the indictment against him nor heard the same read and did not know its contents and had not been served with a copy of the indictment under which he was tried, was under arrest and in jail from the time he was brought to Comanche as aforesaid until his trial; he shows to the Court that he was informed that he was charged with selling whisky in Comanche County, but believed it was for making but one sale only, and acting under such belief, he entered his plea as aforesaid; he shows to the Court that it is true that he did make one sale of intoxicating liquor to Clay Lester and only one under the following circumstances: Defendant was running a restaurant in the town of Comanche at the time and had some alcohol on hand for his own use. That said Clay Lester on the occasion referred to begged him to let him (Lester) buy a pint of said liquor, which this defendant in an unguarded moment permitted him to do, which is the only sale of intoxicating liquor this defendant has ever made to any person or persons, in Comanche County, Texas. Defendant here denies specifically that he ever sold intoxicating liquors to said Clay Lester and said Dan Norment or to other persons as charged against him in said indictment, except the single sale to Clay

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Lester as above set out, so that the defendant shows to the Court that when he entered his plea of guilty he in good faith believed he was so pleading as to a single sale only and to no other sale. Defendant shows that he has had no attorney until after his conviction, being poor and without means to employ an attorney until friends came to his assistance after his trial. That he did not know the gravity of the charge against him until the indictment was read to the jury and he learned for the first time that he was charged with more than one sale of intoxicating liquors, and was confused; he shows that he consulted with the sheriff who had him under arrest and that the sheriff advised him that the easiest or best way would be to plead guilty, and knowing the fact to be that he (defendant) had made one sale only, defendant was thereby misled. Defendant shows that at the time charged in the indictment the said Dan Norment and defendant were personal enemies and were not on speaking terms, and that if the said Dan Norment procured any intoxicating liquors from defendant's restaurant it was done without any knowledge or consent of defendant at the time or afterwards. Defendant shows to the court that he has good reasons to believe and does believe that on another trial of this cause, after a fair and full investigation, no more than one sale of intoxicating liquors can be shown to have been made by him as hereinbefore stated, and he further states that when questioned by the court touching his plea of guilty his impression of one sale only and in truth and fact according to his understanding so entered his plea."

Thus it is seen that the only question presented for review by this motion was whether or not appellant knew at the time he entered the plea of guilty he was charged with pursuing the business or occupation of selling intoxicating liquors, or was under the impression that he was only charged with making a single sale. Appellant supports this plea by his testimony when the motion was heard, but the testimony of the district attorney and the affidavit of the sheriff would show that he was fully apprised of the offense charged against him at the time he entered the plea. The court hearing the motion evidently found the testimony of the district attorney and the sheriff to be true, and under such circumstances we would not be authorized to find otherwise. However, in this court, apparently for the first time, appellant seeks to raise the question, that although he entered a plea of guilty, he desired and told the court he desired to withdraw this plea before the court had delivered his charge to the jury. We want to say and emphasize the fact that any time before the retirement of the jury a person on trial would have the right to withdraw a plea of guilty, and put upon the State the burden of proving his guilt beyond a reasonable doubt. But is this question presented in a way that we can review it? As before stated, there is no bill of exceptions in the record, and Article 938 of the Code of Criminal Procedure provides that this court may affirm the judgment, or may reverse and remand, or may reverse and dismiss, or may reform and correct the

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judgment, as the law and the nature of the case may require, but we shall presume the proceedings were regular and in accordance with law unless such matters were made an issue in the court below, and it affirmatively appears to the contrary by bill of exceptions properly signed and allowed by the judge, or proven up by bystanders and incorporated in the transcript. It is true that this court held in the case of Noble v. State, 50 Tex. Crim. Rep., 581; 99 S. W. Rep., 996, that the bill of exceptions could be reserved to the action of the court in overruling the motion for new trial. But in no case we have had our attention called to has it been held that the matter can be raised, on the evidence adduced on the trial, for the first time in this court. In the evidence adduced on the hearing of the motion for new trial two witnesses testified; one, Frank Cadenhead, says: "After he (defendant) had entered his plea of guilty he then went to the judge and said that he wanted to withdraw his plea of guilty and the judge told him it was too late then and said that he would hear him on a motion for a new trial." Mr. McCamey testified: "After the defendant plead guilty and the case was tried, then the defendant asked the court's permission to speak to a lawyer and he and the sheriff went off and talked to Mr. Kerby, and then he came back and told the court that he wanted to withdraw his plea of guilty. The court told him that he would hear him on his motion for a new trial."

These are all of the witnesses introduced by the appellant, and this testimony was not germane to any ground in the motion for new trial. there being no allegation that after entering a plea of guilty that he requested leave of the court to withdraw that plea. This not having been made an issue in the court below by any ground in the motion for new trial, it is too late to present it for the first time in this court, when no bill was reserved to the action of the court, if he did do so, in refusing to allow him to withdraw his plea of guilty before verdict, and no such complaint being made in the motion for new trial. The evidence adduced on the trial would support a verdict that appellant was engaged in the business or occupation of selling intoxicating liquors in prohibition territory, and as one of the witnesses states that the request of appellant to withdraw his plea of guilty was "after the case was tried," we are not authorized to find that the court acted improperly.

The only other ground in the motion for new trial we deem necessary to notice is the one that alleges the verdict was reached by lot or chance. The testimony heard on the motion shows that eleven of the jurors favored assessing the punishment at only two years in the penitentiary, while the twelfth man favored giving him three years. After discussing the matter, the twelfth man proposed that if the eleven would come to two years and one month he would agree to that verdict. This was agreed to by all the jury, and they so returned their verdict. This was not arriving at a verdict by lot or chance, but was a compromise of their differences upon which they all agreed.

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We wish to reiterate that, although the defendant may have entered a plea of guilty, if, before the jury retired, he desired to withdraw such plea, he ought to have been permitted to do so, and if the court refused to permit him to do so, and if the matter was presented to us in a way we would under the law be authorized to review it, such action on the part of the court would present reversible error. But as this question is not presented in the motion for new trial nor in any bill of exceptions, under the statutes of this State we are not authorized to act thereon, and the judgment is affirmed.

Affirmed.

[Rehearing denied Jan. 8, 1913.—Reporter.]

HENRY PACE V. STATE.

No. 1959. Decided January 8, 1913.

Rehearing Denied February 5, 1913.

1.—Murder—Continuance—Second Application.

Where defendant's second application for continuance did not state the witnesses were not absent by the procurement and consent of the defendant, and the same showed a want of diligence, there was no error in overruling same.

2.—Same—Evidence—Reproduction of Testimony.

Where, upon trial of murder, the State's witness who had testified on a previous trial was shown to reside beyond the limits of the State, there was no error in reproducing his testimony. Following Robertson v. State, 63 Texas Crim. Rep., 216, and other cases.

3.—Same—Evidence—Stenographer's Transcript.

Where the court stenographer testified that the testimony of the absent witness was a correct transcript of his testimony, there was no error in admitting same in evidence.

4.—Same—Evidence—Threats of Defendant.

Where, upon trial of murder, the court admitted the testimony as to defendant's threats to the effect that he would kill anybody who killed his hogs, and the same in connection with other testimony individuated the deceased as the person of whom defendant was speaking, there was no error; the court excluding other parts of the declarations which were not admissible. Following Pace v. State, 58 Texas Crim. Rep., 90.

5.—Same—Evidence—Declarations of Defendant.

Where the declarations of defendant taken together with other testimony were clearly admissible, there was no error.

6.—Same—Evidence—Reproduction of Testimony—Bill of Exceptions.

In the absence of a bill of exceptions to the reproduction of testimony of a witness living beyond the State, the matter cannot be considered, however, if properly presented, the testimony was admissible, a proper predicate having been laid.

7.—Same—Accomplice—Testimony—Charge of Court.

Where the charge of the court on accomplice testimony followed approved precedent, there was no error. Following Brown v. State, 57 Texas Crim. Rep., 570, and other cases.

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8.—Same—Accomplice—Charge of Court.

Where it was not certain as to whether a State's witness was an accomplice, the court properly submitted the issue to the jury. Following Pace v. State, 58 Texas Crim. Rep., 90.

9.—Same—Charge of Court—Imputing Crime to Another.

Where defendant contended that another committed the murder, the court properly submitted that question to the jury, instructing them to acquit defendant in case of a reasonable doubt. Following Blocker v. State, 55 Texas Crim. Rep., 30.

10.—Same—Charge of Court—Manslaughter.

Where the evidence did not raise the issue of manslaughter, there was no error in the court's failure to charge thereon.

Appeal from the District Court of Cass. Tried below before the Hon. P. A. Turner.

Appeal from a conviction of murder in the second degree; penalty, five years imprisonment in the penitentiary.

The opinion states the case.

R. D. Hart and *Mahaffey & Thomas*, for appellant.—On question of declarations of defendant: Pace v. State, 58 Texas Crim. Rep., 90.

On question of court's charge on accomplice testimony: Green v. State, 60 Tex. Crim. Rep., 530; 132 S. W. Rep., 806; Pace v. State, 58 Texas Crim. Rep., 90; Stockman v. State, 24 Texas Crim. App., 387; Stephens v. State, 10 id, 120; Sessions v. State, 37 Texas Crim. Rep., 58; Davis v. State, 55 Tex. Crim. Rep., 495; 117 S. W. Rep., 159; Close v. State, 55 Tex. Crim. Rep., 380; 117 S. W. Rep., 137.

On question of reproduction of testimony: Pace v. State, 58 Texas Crim. Rep., 90.

C. E. Lane, Assistant Attorney-General, for the State.—On question of reproduction of testimony: Robertson v. State, 63 Texas Crim. Rep., 216, and other cases.

HARPER, JUDGE.—This is the third appeal in this case, the report of the opinions on the former appeals being reported in 58 Tex. Crim. Rep., 90; 124 S. W. Rep., 949; 61 Tex. Crim. Rep., 438, and 135 S. W. Rep., 379. In those cases will be found a sufficient statement of the evidence to render it unnecessary to state the facts here. Appellant was again found guilty of murder in the second degree, his punishment being assessed at five years confinement in the penitentiary.

Defendant filed an application to continue the case on account of the absence of Mrs. John Fricks and Charley Kyle. In approving the bill the court states: "The above and foregoing bill of exceptions approved, allowed and ordered filed as a part of the record in this cause, with the following explanation: Mrs. Fricks was present at the first trial of defendant and was not put on the stand. At his second trial defendant made an application to continue because she was

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sick and could not attend it; was overruled. She and her husband lived in Bowie County. Her father lived near Atlanta, in Cass County, on February 6th. This case was set for Monday, 19th of February. On Sunday she, her husband and children left home in Bowie County and went to her father's in Cass County. Her husband came to court on Monday. I was reliably informed that Mrs. Fricks visited her father's home until after the trial and returned with her family to her own home. Her husband was firm friend of defendant and Dick Cain and attended all their trials, even the two examining trials. He was active in their defense. Several witnesses on this trial testified to admissions made by Dick Cain that he killed deceased. Charley Kyle was a close friend of defendant and lived for a long time near him in Bowie County after this indictment and had never been summoned.'' These facts apparently defendant recognized to be true, as he accepts the bill and files it, and in consequence must have known he would be bound by the qualification. Hardy v. State, 31 Texas Crim. Rep., 289; Levine v. State, 35 Texas Crim. Rep., 647; Blain v. State, 34 Texas Crim. Rep., 448. The diligence as to the witness Kyle is insufficient, and the witness McLimore virtually admits all he states he expects to prove by Mrs. Fricks McLimore had said and done. As to the statements of Cain, a number of witnesses testify to the same facts, and this would be but cumulative of their testimony, and this being the second application for a continuance, this would not present error. But in addition to this, the application is insufficient in law, in that it does not state that the witnesses are not "absent by the procurement and consent of defendant." White v. State, 9 Texas Crim. App., 41.

The defendant objected to the testimony of Frank Hill being reproduced. The first ground of the objection is that no sufficient predicate had been laid. S. T. Rudy testified, "I know Frank Hill, who testified on a previous trial of this case. He lives in DeQueen, State of Arkansas. He is now at that place. He has lived in Arkansas for a year. He does not live or reside in Texas. He is my son-in-law." Webster Rudy testified: "Frank Hill is my brother-in-law. He lives in DeQueen, Arkansas. His wife is at my father's house in Miller County, Arkansas. Have seen him there twice within the last month." This was a sufficient predicate to authorize the reproduction of the testimony. Post v. State, 10 Texas Crim. App., 579; Connor v. State, 23 Texas Crim. App., 378; Peddy v. State, 31 Texas Crim. Rep., 547; Robertson v. State, 63 Tex. Crim. Rep., 216, 142 S. W. Rep., 533.

The second objection was that the court erred in permitting the stenographer to reproduce the testimony as transcribed by him. The stenographer testified that it was a correct transcript of the testimony, and the court did not err. Stringfellow v. State, 42 Texas Crim. Rep., 588; Morawitz v. State, 49 Texas Crim. Rep., 366; Casey v. State, 50 Texas Crim. Rep., 392; Arnwine v. State, 54 Texas Crim.

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Rep., 213; Cornelius v. State, 54 Texas Crim. Rep., 173; Underhill on Crim. Ev., Sec. 267.

In bills four and five it is complained that S. T. Rudy and Frank Hill were permitted to testify that appellant came to Rudy's house the evening of the killing and while there stated that "he would kill anybody who killed his hogs." When we take the connection of this remark together with the remaining portion of the testimony, it clearly individuates the deceased as the person of whom appellant was speaking, and this portion of the conversation was properly held to be admissible on the former appeal in this case. (Pace v. State. 58 Texas Crim. Rep., 90.) The court on this trial excluded all that part of the conversation which this court on the former appeal held to be inadmissible.

An isolated statement in the testimony of Watts McLimore is taken out and excepted to. When the testimony of the witness is read, it is seen that the testimony is clearly admissible, and shows that when leaving Rudy's house he had already conceived the idea of killing deceased, and carried it out less than half an hour afterwards.

The complaint in the motion for new trial as to the reproduction of the testimony of the witness, Watts McLimore, cannot be considered as no bill of exceptions was reserved, if it was objected to. However, were the matter properly presented, the court did not err in admitting the testimony. Mrs. Jack Porterfield testified: "I am a sister of Watts McLimore. I live at Vivian, Louisiana. Watts McLimore lives at Vivian, Louisiana. He has been living there now for two or three years. I left Vivian yesterday. He was not there then. He had gone off to some place in Louisiana. I have forgotten the name of the place. I received a letter from him yesterday written from that place. He is now in the state of Louisiana and not in Texas." This was a sufficient predicate to authorize the introduction of the testimony.

Objection is again made to the charge of the court on accomplice testimony. This court criticized the charge of the court in this respect on the two former appeals, but in writing his charge on this trial the court conformed his charge to the holding of this court in Brown v. State, 57 Texas Crim. Rep., 570; King v. State, 57 Texas Crim. Rep., 363, and other cases.

The complaint that the court erred in submitting the question of whether or not Watts McLimore was an accomplice, and in not peremptorily instructing them that he was an accomplice, was decided adversely to defendant's contention on the former appeal in this case. Pace v. State, 58 Texas Crim. Rep., 90. The same may be said as to the submission of this issue as to the witness, Don Cochran.

It is insisted that the court erred in instructing the jury: "If you believe from the evidence, or have a reasonable doubt that Dick Cain shot and thereby killed said Felix Grundy, then you will find the defendant not guilty." It was the contention of defendant that

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Cain was the person who shot and killed deceased, and this was a proper submission of that issue, and it does not shift the burden on defendant to prove that Cain killed him. The court specifically tells the jury if they have a reasonable doubt in regard to the matter to acquit the defendant. (Blocker v. State, 55 Texas Crim. Rep., 30.) And having given this charge, it was not necessary to give the special charge requested in regard to this issue.

The facts in the case do not raise the issue of manslaughter, and the court did not err in failing to charge the jury on that degree of homicide. If the State's evidence is to be believed, the killing was without excuse, mitigation or justification. If the defendant's theory is true, he did not kill deceased, or if he did, he was justified in so doing. These issues were all fairly and fully submitted to the jury by the court, and defendant, we think, has had a fair and impartial trial.

The judgment is affirmed.

Affirmed.

[Rehearing denied February 5, 1913.—Reporter.]

O. W. THOMPSON v. STATE.

No. 2170. Decided January 8, 1913.

1.—Forgery—Indictment—Written Instrument—Statutes Construed.

Under Article 924, Penal Code, it is not required to allege specifically that the forged instrument was in writing, it was, therefore, unnecessary to allege that the instrument was in writing.

2.—Same—Indictment—Words and Phrases—Grammar.

Grammatical errors will neither vitiate a law nor an indictment, and where the word "would" was left out, yet the whole count in the indictment showed that this was but a grammatical error, there was no reversible error. Following Murray v. State, 21 Texas Crim. App., 620, and other cases.

3.—Same—Rule Stated—Indictment—Certainty—Statutes Construed.

In construing indictments, the statute requires that the context and subject matter in which the words therein are employed shall be taken into consideration, and the certainty required is such as will enable the accused to plead the judgment in bar of another prosecution. Article 453, C. C. P.

4.—Same—Ordinary Language Employed—Statutes Construed.

An indictment which charges the commission of an offense in ordinary and concise language so as to enable a person of common understanding to know what is meant, and with that degree of certainty to give the defendant notice of the particular offense with which he is charged and enables the court to pronounce proper judgment is sufficient. Article 460 C. C. P.

5.—Same—Form of Indictment—Statutes Construed.

An indictment will not be held insufficient nor shall the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection of form in such indictment which does not prejudice the rights of defendant. Article 476, C. C. P.

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6.—Same—Surplusage—Indictment.

Unnecessary words in an indictment should be rejected as surplusage, and redundant words and allegations may be treated as mere surplusage. Following Mayo v. State, 7 Texas Crim. App., 342, and other cases.

7.—Same—Indictment—Case Stated—Deed—Statutes Construed.

Where the language objected to in the indictment must be regarded as surplusage, and the whole of the count in said indictment clearly charges an offense, the same is sufficient; and where defendant was charged with forgery of a land title under the statute, Article 947, Penal Code, the indictment complied with this rule, there was no error.

Appeal from the District Court of Mitchell. Tried below before the Hon. James L. Shepherd.

Appeal from a conviction of forgery; penalty, six years imprisonment in the penitentiary.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, and *Royall G. Smith,* for the State.—On question of indictment: Wade v. State, 22 Texas Crim. App., 256; 19 Cyc. 1404; Hawkinsv. State, 9 So. Rep., 652; People v. Rynders, 12 Wend., 425; State v. Fisher, 65 Mo., 437; Gibbons v. State, 36 Texas Crim. Rep., 469; Webb v. State, 39 id, 534; Howard v. State, 37 id, 494.

PRENDERGAST, JUDGE.—The appellant was convicted of forgery and his penalty fixed at six years in the penitentiary.

There is no statement of facts or bill of exceptions in the record. There is but one question raised which we can consider in the absence of a statement of facts, and that is the sufficiency of that count of the indictment under which appellant was convicted. There were two counts. Both were submitted under the charge of the court, but the jury acquitted the appellant under the first.

The statute is as follows: "Article 947. Every person who falsely makes, alters, forges or counterfeits, or causes or procures to be falsely made, altered, forged or counterfeited, or in any way aids, assists, advises or encourages the false making, altering, forging or counterfeiting of any certificate, field notes, returns, survey, map, plat, report, order, decree, record, patent, deed, power of attorney, transfer, assignment, release, conveyance or title paper, or acknowledgment, or proof of record, or certificate of record belonging or pertaining to any instrument or paper, or any seal, official or private stamp, scroll, mark, date, signature, or any paper, or any evidence of any right, title, or claim of any character, or any instrument in writing, document, paper or memorandum, or file of any character whatsoever, in relation to or affecting lands, or any interest in lands in this State, with the intent to make money or other valuable thing thereby, or with intent to set up a claim or title, or aid or assist any one else in setting up a claim or title, to lands or any interest in lands,

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or to prosecute or defend a suit, or aid or assist any one else in prosecuting or defending a suit with respect to lands, or to cause a cloud upon the title, or in any way injure, obtain the advantage of, or prejudice the rights or interest of the true owners of lands, or with any fraudulent intent whatever, shall be deemed guilty of forgery, and be punished by imprisonment in the State penitentiary at hard labor not less than five nor more than twenty years."

The count of the indictment, after the formal part, alleges that appellant on or about April 11, 1911, and anterior to the presentment of the indictment in said State and county, "with the intent to injure and defraud and without lawful authority did assist, advise and encourage the false making and forging and affixing of a fictitious and pretended signature, by some person, whose name is to the grand jurors unknown, to a certain instrument, to-wit, a deed purporting to be the act of Isaac L. Ellwood, which said instrument then and there related to and affected an interest in lands in Texas, and which said instrument (he, the said person, whose name is to the grand jurors unknown, did then and there falsely make and forge in such a manner as that such deed so made, if the same were true, have affected the title and interest to lands in the State of Texas and the County of Mitchell, therein, which said false deed), purports to be an instrument entitling one A. C. Morrison, as grantee, to the land conveyed therein, being certain lands situated in the State of Texas, and in the County of Mitchell therein, and is of the tenor following, that is to say:" Then follows a literal copy of the forged deed together with the certificate of acknowledgment thereto, the file mark thereon of the county clerk, filing it for record in Mitchell County and the certificate of the clerk of said county of its record. The indictment then concludes as follows: "Whereas, in truth and in fact, the said signature was then and there fictitious, and was not made by the said Isaac L. Ellwood, as he, the said O. W. Thompson, then and there well knew, against the peace and dignity of the State."

There was no motion in the court below to quash the indictment, nor to arrest the judgment, but in his motion for a new trial appellant urges that the indictment is fatally defective in that (1) it does not charge that the forged instrument was in writing; and (2) that it does not charge that said instrument, "would, if the same had been true, affected the title to said land," etc.

As to the first point the statute does not require specifically that the forged instrument shall be in writing as Article 924 Penal Code does; so that it is unnecessary to discuss the first objection above stated.

As to the second objection, while it, perhaps, would have been better for the indictment to have used the word "would" in the connection appellant claims it should have been used, yet, to take the whole count in the indictment, at most it is but ungrammatical. It is the settled law of this State that grammatical errors will neither

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vitiate a law nor an indictment. Murray v. State, 21 Texas Crim. App., 620; Rigby v. State, 27 Texas Crim. App., 55. Nor will it vitiate a verdict. Roberts v. State, 33 Texas Crim. Rep., 83, and other cases cited in section 907 of White's C. C. P. In construing indictments the statute requires that the context and subject matter in which the words therein are employed, shall be taken into consideration. Also that the certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offense. C. C. P., Art. 453. And that the indictment which charges the commission of an offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant and that degree of certainty that will give the defendant notice of the particular offense with which he is charged and enable the court, on conviction, to pronounce the proper judgment shall be deemed sufficient. C. C. P. Article 460. And that an indictment shall not be held insufficient, nor shall the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection of form in such indictment which does not prejudice the substantial rights of the defendant. C. C. P. Article 476. Applying these statutes and taking into consideration the context and subject matter of the allegations in this indictment, the said count is sufficient against the said objection made thereto by appellant.

Again, it is elementary in this State that unnecessary words in an indictment may and should be rejected as surplusage, and that redundant allegations and allegations which are in no manner necessary to a description of an offense, and which are not essential to constitute the offense, and which can be entirely omitted without affecting the charge against the defendant, and without detriment to the indictment, are treated as mere surplusage and may be entirely disregarded as part of the indictment. Mayo v. State, 7 Texas Crim. App., 342; Gordon v. State, 2 Texas Crim. App., 154; Burke v. State, 5 Texas Crim. App., 74; Hampton v. State, 5 Texas Crim. App., 463; Smith v. State, 7 Texas Crim. App., 382; Rivers v. State, 10 Texas Crim. App., 177; Gibson v. State, 17 Texas Crim. App., 574; Holden v. State, 18 Texas Crim. App., 91; Moore v. State, 20 Texas Crim. App., 275; McConnell v. State, 22 Texas Crim. App., 354; Osborne v. State, 24 Texas Crim. App., 398; Cudd v. State, 28 Texas Crim. App., 124; Watson v. State, 28 Texas Crim. App., 34; McLaurin v. State, 28 Texas Crim. App., 530; Finney v. State, 29 Texas Crim. App., 184; Hammons v. State, 29 Texas Crim. App., 445; Taylor v. State, 29 Texas Crim. App., 466; Waters v. State, 30 Texas Crim. App., 284; McDaniel v. State, 32 Texas Crim. Rep., 16; Loggins v. State, 32 Texas Crim. Rep., 358; Lassiter v. State, 35 Texas Crim. Rep., 540; Williams v. State, 35 Texas Crim. Rep., 391; Webb v. State, 36 Texas Crim. Rep., 41; Matthews v. State, 39 Texas Crim. Rep., 553; Jordan v. State, 37 Texas Crim. Rep., 222.

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In quoting the charging part of said count in the indictment herein the words therein which are inclosed in parenthesis by us in copying the same comes within these rules and should be regarded as surplusage in this indictment and leaving out such words, the others in the count clearly charge the offense under said statute under which appellant is prosecuted herein, correctly and properly. It is unnecessary to cite other authorities.

There are no other questions sought to be raised which we can consider in the absence of a statement of facts. The judgment will, therefore, be affirmed.

Affirmed.

JOHN BYRD V. STATE.

No. 1910. Decided November 13, 1912.

Rehearing Denied January —, 1913.

1.—Occupation—Selling Intoxicating Liquors—Local Option—Jurisdiction.

Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, defendant moved to transfer the case from the District Court to the County Court, the motion was properly overruled. Fitch v. State, 58 Texas Crim. Rep., 366, and other cases.

2.—Same—Indictment—Approved Precedent.

Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the indictment followed approved precedent, the same was sufficient. Following Mizell v. State, 59 Texas Crim. Rep., 226, and other cases.

3.—Same—Indictment—Date of Offense—Passage of Law.

Where the date of the offense was alleged to be fifteen months after the law became effective under which defendant was prosecuted, it was not necessary to allege in the indictment that the offense occurred subsequent to the passage of the law.

4.—Same—Indictment—Date of Offense—Limitation.

Where the indictment alleged that defendant on a given date pursued the business and occupation of selling intoxicating liquors in local option territory, such allegation would admit proof that he was engaged in such occupation within any time prior to the presentment of the indictment within the period of limitation, and in this instance, subsequent to the enactment of the law covering the months charged in the indictment, and it was not necessary to repeat the allegation that he was pursuing such business or occupation each time a sale was alleged to have been made. Davidson, Presiding Judge, dissenting.

5.—Same—Rule Stated—Certainty—Indictment.

The certainty required in an indictment is only such as will enable the defendant to plead the judgment that may be given upon it in bar of any prosecution for the same offense.

6.—Same—Distinct Offense—Felony—Sale.

Where the indictment charged the defendant with pursuing the business or occupation of selling intoxicating liquors in local option territory, the same is a distinct offense from making a sale of intoxicating liquors in local option territory and is a felony. Fitch v. State, 58 Texas Crim. Rep., 366.

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7.—Same—Witnesses—Indictment—Indorsement.

Where the main State's witnesses were indorsed on the indictment, a motion requiring the State to indorse on the indictment the names of all its witnesses was correctly overruled.

8.—Same—Jury and Jury Law—Challenges.

Where one of the jurors was excused by the State, and the other juror said that the opinion he had formed from hearsay would not influence his verdict, and he was challenged by both the State and the defendant, and no objectionable juror served in the case, there was no error.

9.—Same—Argument of Counsel.

Where the remarks of State's counsel were not of that nature that would call for a reversal, and the jury were orally instructed not to consider the same, there was no reversible error.

10.—Same—Evidence—Other Sales.

Where the indictment charged defendant with pursuing the business or occupation of selling intoxicating liquors in local option territory on a certain date, there was no error in admitting testimony of sales of whisky on dates other than the dates named in the indictment.

11.—Same—Age of Witness.

There was no error in permitting the State to introduce testimony of the age of the State's witness.

12.—Same—Evidence—Other Transactions.

Upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, there was no error of admitting testimony of large shipments of intoxicating liquor about this time to the defendant.

13.—Same—Evidence—Custom.

Upon trial of selling intoxicating liquor as an occupation in local option territory, there was no error in the court's refusal to permit defendant to show that it was the custom of patrons of his place of business to have defendant order intoxicating liquors for them.

14.—Same—Evidence—Self-Serving Declarations.

Where defendant did not testify in the case, he could not make evidence for himself by proving by others that on a given occasion he had told them certain things.

15.—Same—Charge of Court—Bill of Exceptions.

Where the objections to the court's charge was that the court erred in charging the jury as follows, and then set out the paragraph of the charge without pointing out the error complained of, the same cannot be considered on appeal.

16. Same—Rule Stated—Civil Cases—Practice on Appeal.

The rule in criminal cases under Article 743, Code Criminal Procedure provides that no criminal case shall be reversed on account of error in the charge of the court, unless the charge is excepted to at the time of the trial or in the motion for new trial and the error pointed out, and shall not be regarded as excepted to as in civil cases.

17.—Same—Reasons of the Rule.

As to why the Legislature, as to exceptions to the charge of the court, made a distinction between civil and criminal cases, is not a question for the court, but for the law making body, and this construction has been followed by the Court of Criminal Appeals for over twenty years. Following Quintana v. State, 29 Texas Crim. App., 401, and other cases.

18.—Same—Rule Stated—Error Must Be Pointed Out.

While the complaint to the charge of the court may be preserved by bill of exceptions or by a ground in the motion for new trial, yet, in either event,

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the alleged error must be specifically pointed out or it will not be considered on appeal. Following Sims v. State, 30 Texas Crim. Rep., 605, and other cases.

19.—Same—Legislation Suggested—Procedure.

See opinion for suggestions to the Legislature to provide one rule of procedure on appeal applicable alike to all courts and to all cases whether civil or criminal, felony or misdemeanor.

20.—Same—Practice on Appeal—Objections to Charge of Court.

The Court of Criminal Appeals, as the law now stands, cannot consider complaints of the charge of the court nor the failure to give the special charges requested, unless the same are pointed out and reserved as the law directs, or unless fundamental error is presented.

21.—Same—Sufficiency of the Evidence.

Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the evidence sustained the conviction, there was no error.

Appeal from the District Court of Brown. Tried below before the Hon. John W. Goodwin.

Appeal from conviction of pursuing the occupation of selling intoxicating liquors in local option territory; penalty, two and one-half years imprisonment in the penitentiary.

The opinion states the case.

Harrison & Wayman, for appellant.—On question of insufficiency of the indictment: Fleming v. State, 62 Tex. Crim. Rep., 653, 139 S. W. Rep., 598; Pridemore v. State, 59 Tex. Crim. Rep., 563, 129 S. W. Rep., 1112; Mizell v. State, 59 Tex. Crim. Rep., 226, 128 S. W. Rep., 125; Bell v. State, 62 Tex. Crim. Rep., 242, 137 S. W. Rep., 670; Fitch v. State, 58 Tex. Crim. Rep., 366; 14 Cys., 496; Com. v. Bessler, 30 S. W. Rep., 1012.

On question of defendant's declarations: McGowen v. McGown, 52 Texas, 657; 11 Enc. of Ev., p. 302; Whites Penal Code, Section 1236.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was prosecuted and convicted of pursuing the occupation of selling intoxicating liquors in local option territory, and his punishment assessed at two and one-half years confinement in the penitentiary.

Appellant moved to transfer this case to the County Court. This was decided adversely to the contention of appellant in the cases of Fitch v. State, 58 Texas Crim. Rep., 366; 127 S. W. Rep., 1040, and Mizell v. State, 59 Texas Crim. Rep., 226.

The indictment is also assailed, but we do not deem it necessary to discuss all the grounds, they having been passed on so often by this court. Mizell v. State, 59 Tex. Crim. Rep., 226, 128 S. W. Rep., 125; Slack v. State, 61 Tex. Crim. Rep., 372, 136 S. W. Rep., 1073; Dozier v. State, 62 Tex. Crim. Rep., 258, 137 S. W. Rep., 679, and cases cited. However, appellant assigns as an additional ground to

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those heretofore passed on, the ground that as the indictment charged that the offense took place on or about the 5th day of October, 1910, and the law under which he was prosecuted only became effective July 10, 1909, that the indictment is invalid, because it did not contain the words "and subsequent to the passage of the law." As the date of the offense is alleged fifteen months after the law became effective, no such allegation was necessary. Indictments can only be quashed for defects apparent on the face thereof, and as the offense is alleged to have been committed subsequent to the passage of the law, it was good on its face. The authorities cited by the appellant do not sustain his contention. In Alabama, from which State a number of cases are cited by appellant, it is not necessary to allege the date of the offense, unless it is a material ingredient of the offense, and in that State an indictment in which no date was alleged, it was held that a date ought to be alleged, or the indictment make it manifest that the act was committed subsequent to the passage of the law. In this case a date is alleged, and the indictment charges the offense to have been committed subsequent to the passage of the law.

In the case of Hobnett v. State, 5 So. Rep., 518, a Mississippi case cited by appellant, the date alleged as the date of the commission of the offense was prior to the passage of the law, consequently for this defect the indictment was declared invalid. In that case it was held the indictment must allege the offense to have been committed subsequent to the passage of the law. This indictment does so charge. In the case of Massey v. State, 2 S. E., 445, a North Carolina case cited by appellant, the law as amended became effective February 16th, and thereafter on April 1st the pleader in the indictment did not allege the elements of the offense as defined by the amended act, and the indictment having alleged the offense as subsequent to the passage of the act, the court held the indictment bad because it failed to allege the elements of the offense at the alleged date of the commission thereof. As hereinbefore stated, none of the cases cited by appellant sustain his contention, but all the authorities hold the indictment valid, drawn as in this case on that issue.

Appellant further contends that as the indictment alleges "that on or about the 5th day of October, 1910, the appellant did then and there unlawfully engage in and pursue the occupation and business of selling intoxicating liquor in violation of law, and did, on a given date, make a sale to one man, and on a different date make a sale to another man," etc., "and that during the months of June, July, August, September, October, November, and December, 1910, and January, February, March and April, 1911 (all being anterior to the filing of the indictment), did make sales to persons to the grand jury unknown," it is defective in that it did not contain an additional allegation that during all that time appellant continued to engage in and pursue the business and occupation. Having alleged that appellant on a given date pursued the business or occupation, this allegation would

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admit proof that appellant was engaged in such occupation within any time prior to the presentment of the indictment within the period of limitation, or, in this instance, subsequent to the enactment of the law, covering the months charged in the indictment. (Cudd v. State, 28 Texas 124; Abrigo v. State, 29 Texas Crim. App., 143; Shuman v. State, 34 Texas Crim. Rep., 69.) The offense denounced by this statute is the pursuing of a business or occupation,—not the making of a sale, but evidence that sales have been made is admissible as proof going to show that one is engaged in the business and the State having alleged that he was pursuing the occupation and business, and adduced proof as to sales over a period of time as tending to show that he was so engaged, if the State should attempt a second prosecution covering the same period of time, a plea of former conviction would necessarily be sustained, but having once made a proper allegation that he was pursuing the business and occupation, it was not necessary to repeat such allegation each time a sale was alleged to have been made, as the allegation that he on or about a given date covered and admitted proof over a period prior to the filing of the indictment generally for the full period at which the law has fixed a limitation as a bar, but in this instance from and after the law became effective until the filing of the indictment herein, and the court so limited the testimony. (Subdivision 6 of Article 439, Code of Criminal Procedure; the State v. White, 41 Texas, 64; Wharton's Precedents of Indictments and Pleas 9.) The indictment in this case follows the forms in this respect as laid down in White's Annotated Code, Secs. 156, 158, 159, 160, 162, and 163, and which have been frequently approved by this court. Our Code provides that the certainty required in an indictment is only such as will enable the defendant to plead the judgment that may be given upon it in bar of any prosecution for the same offense, and this conviction would bar any further prosecution of appellant for the offense charged, under the evidence adduced, from and after the law became effective until the date of the filing of the indictment herein.

The indictment in this case charges appellant with pursuing the business or occupation of selling intoxicating liquors, and is a distinct offense from making a sale of intoxicating liquors, and is a felony in this State, and the court did not err in so holding. Fitch v. State, 58 Texas Crim. Rep., 366.

The appellant filed a motion requiring the State to endorse on the indictment the names of all its witnesses. The court overruled the motion and in approving the bill states the indictment contained the following endorsement: "Found on the testimony of Ed Blevins: Names of witnesses: Ed Blevins, A. N. Davenport, Elmer Jones, Tom Ward, T. B. Speed, Dan Harris, T. A. Morrison, L. L. White, C. C. Lockwood," and the court states these were all of the main witnesses. As thus qualified the bill presents no error. Sec. 327 White's Ann. Proc., and authorities cited.

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In two of the bills defendant complains of being required to exhaust peremptory challeges on two jurors, S. F. Haynes and W. G. Churchill. As to the juror Churchill, he did not serve on the jury; was not challenged by defendant, but was challenged by the State. As defendant did not exhaust any challenge on that juror, and he did not serve on the jury, he has no ground for complaint. The juror Haynes answered that he had an opinion formed from hearsay, but such an opinion would not influence his verdict; that he had talked with none of the witnesses. This juror was challenged both by the State and defendant, and did not serve on the jury. The court did not err in his ruling. (Subdiv. 13 of Article 673.) In addition to this it is not shown that any objectionable juror served in the case.

In another bill it is shown that defendant objected to certain remarks of the district attorney, and the court at once reprimanded that official and orally instructed the jury not to consider such remarks, and in addition to this he gave the charges requested by defendant in this respect, and under such circumstances the remarks were not of that nature that would call for a reversal of the case.

There are a number of bills of exception objecting to the court permitting witnesses to testify to sales of whisky on dates other than the date named in the indictment. The indictment charged that appellant pursued the business or occupation on or about the 5th day of October, and each sale testified to was a circumstance tending to show that appellant was engaged in that business. As we discussed this question in passing on the sufficiency of the indictment, we do not deem it necessary to do so again.

In another bill it is shown that a witness for the State was asked his age. The age of the witness could not be material in this case and the fact that he stated his age presents no error.

The record in this case discloses that appellant from on and after June 9, 1911, signed for and had consigned to him the following shipments of intoxicating liquor:

June 9—One cask of beer, weight 250 lbs.
June 22—Two boxes of liquor, weight 110 lbs.
June 29—One cask of beer, weight 250 lbs.
June 30—One box of liquor, weight 50 lbs.
July 8—Two boxes of liquor, weight 100 lbs.
July 11—Two boxes of liquor, weight 100 lbs.
July 15—Box of liquor, weight 70 lbs.
July 25—Two boxes of liquor, weight 100 lbs.
July 29—One package of liquor.

These items continue on through the months of August, September, October, November, December, January and February, showing shipments of liquors to appellant in quantities. It was shown that appellant receipted for these shipments, and that draymen during these months delivered packages to appellant's place of business. In admitting all this testimony there was no error, as appellant was charged

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with pursuing the business or occupation of selling intoxicating liquors, and it was permissible for the State to show the amount of liquors received by him, and that it was delivered at the place where the evidence would show that appellant carried on this business.

In another bill it is complained that the court refused to permit appellant to show that it was the custom of patrons of his place of business to have appellant order intoxicating liquors for them. The court permitted each witness called to testify whether or not he had requested appellant to order liquors for such witness, and it was not error to exclude evidence of the "general custom." If appellant ordered the liquors he received for others he knew that fact, and could have had such person summoned to testify in the case.

What the defendant may have told another person would be but a self-serving declaration. Inasmuch as the defendant did not testify in this case, he could not make evidence for himself by proving by others that on a given occasion he had told them certain things.

Beginning with paragraphs twenty-one up to and inclusive of paragraph thirty-two, complaints of the various paragraphs of the court's charge are criticised in the following language: "Because the court erred in charging the jury as follows, to-wit:" Then follows a paragraph of the charge. No error is pointed out, nor attempted to be pointed out, merely the paragraph of the charge being set out in haec verba. What is the object and purpose of requiring a motion for new trial to be filed in the court trying the case? Is it not to call the attention of the trial judge to the error, if error there be, that he may correct his mistake, and thus avoid the necessity of an appeal? Appellant in his brief cites us many civil cases, in which the Courts of Civil Appeals and our Supreme Court have held that in civil cases this is a sufficient assignment, and that in the assignments of error filed later, or in the propositions stated under the assignment in the brief the error may then be specifically pointed out for the first time, and asks why a more strict rule should be enforced and applied in cases where men's lives and liberty are at stake than in cases where mere property rights are affected. Upon the writer's accession to the bench he entertained the views now so forcibly presented by appellant's counsel, and gave voice to such an opinion in the case of Ryan v. State, 64 Tex. Crim. Rep., 628, 142 S. W. Rep., 878, and we feel even now that there is no just ground to make such distinction in the two character of cases, but if anything a more liberal rule should be applied in criminal than in civil cases, for life and liberty are far more dear to an individual than his property rights. Yet the Court of Criminal Appeals is not the law making power in this State, and it is bound by such rules of procedure as the law-making body may prescribe, and as the Legislature has deemed it proper to provide different rules governing appeals, we are not to pass upon the wisdom of such legislation, but merely to enforce and abide the law as they have written it. If the law is wrong this court ought not to be

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requested nor expected to ignore or change the law, but application should be made to the law-making body. In its wisdom the Legislature has seen fit to prescribe in civil cases on appeal that the charge shall be deemed to have been excepted to without any exception having been taken. Article 1318 of the Revised Civil Statutes provides: "The charge of the court shall constitute a part of the record, *and shall be regarded as excepted to and subject to revision for errors therein,* without the necessity of taking any bill of exception thereto." Thus it is seen that the Legislature has provided that in civil cases the charge of the court is subject to review by the Appellate Court, although not excepted to, and this permission has been construed by the courts to be a command to review it under such circumstances, even though unexcepted to if the error be such as it might and probably did work an injury. Again, Article 1363 of the Revised Civil Statutes, provides: "The ruling of the court in giving, refusing or qualifying, if requested, instructions, shall be regarded as excepted to in all instances." However, the reverse of this is the rule in criminal cases, and made so by legislative enactments. As to why they prescribed a different rule is not for us to theorize over, but merely to obey, if they have done so. And by reading the Code of Criminal Procedure it will be seen that they have provided that the charge of the court *shall not be regarded as excepted to,* but it requires specific complaint to be made, and if this is not done we are without authority to review the charge of the court. Article 743 of the Code of Criminal Procedure provides that no criminal case shall be reversed by this court on account of error in the charge of the court unless the *charge was excepted to at the time of the trial or in the motion for new trial,* and the error pointed out.

As hereinbefore stated, as to why the Legislature made this distinction in civil and criminal cases is a question not for us to determine; that they have made it is manifest, and that they had authority so to do cannot be denied, and this court feels and has always felt bound thereby. The difference in the rules thus prescribed are best illustrated by stating that any defect in a charge in a civil case may be reached by a general demurrer or exception, and the specific objections to the charge may be called attention to by propositions under the general exception; while in a criminal case it takes a special exception to reach the error in the charge—the exception must specifically point out the error whether saved by bill of exception, or by a ground in the motion for new trial. If this difference in procedure is deemed unwise, application should be made to the Legislature to change it. And this construction is not of recent origin, as some seem to think. Emphatic attention was called to it by Judge Davidson in the case of Quintana v. State, 29 Texas Crim. App., 401 (in which the decisions are collated up to that time), and the rule there prescribed has been followed in an unbroken line of decisions now for more than twenty years. In that case he said: "The primary ob-

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ject or purpose of a bill of exception reserved to a charge of the court is to call the attention of the trial judge to the particular matter complained of, so that he may be afforded an opportunity to correct any error he may have fallen into, to the end that the rights of the defendant may not be prejudiced. A general exception does not accomplish this. Another reason why the bill of exception should point out specifically the errors complained of it, to enable this court to ascertain what error was committed without having to examine other portions of the record. This is not done by a general exception. The bill must be so certain and full in its statements that the errors complained of are made to appear by the allegations of the bills itself." And we want to reiterate that while the complaint to the charge may be preserved by a bill of exception or by a ground in the motion for new trial, but when it is preserved in either way, the error, as stated in that opinion, *must be specifically pointed out*. (Sims v. State, 30 Texas Crim. Rep., 605; Benavides v. State, 31 Texas Crim. Rep., 173; (Meyer v. State, 33 Texas Crim. Rep., 42); Hearne v. State, 43 Texas Crim. Rep., 435; Hudson v. State, 44 Texas Crim. Rep., 251.) We have cited no cases decided since the writer of this opinion has been on the bench, but to disabuse the minds of some that this is but a recent rule of decision we have cited only opinions of our predecessors, and many more could be collated. Individually, the writer thinks the rule in both civil and criminal cases should be the same in this respect, and he also thinks the same rules of procedure should govern on appeal whether the case is a felony or misdemeanor, but the Legislature has otherwise provided, and we cannot undertake to legislate by judicial construction. In the present day and time when much is being said about simplifying court procedure, it seems to him that some one would make an effort to have the Legislature provide one rule of procedure on appeal applicable alike to all courts, and to all cases whether civil or criminal, felony or misdemeanor. We have said this much as the Legislature will shortly convene, that steps may be taken, if it is desired, to have the Legislature take action on these matters. But until the Legislature is prevailed on to act, the law as written by them will be applied to all cases on appeal. There is no sound reason that we can see why a man, when convicted for a felony, may, after adjournment of court, file an appeal bond, and be prohibited from so doing when convicted of a misdemeanor; no reason why in a felony case he should be granted ninety days to prepare and file a statement of facts and bills of exception, and only twenty days in case of a misdemeanor; no reason why in a felony case he may first complain of the charge of the court in his motion for new trial, and not be permitted also to do so in a case of misdemeanor; no reason why he should be required to ask a special charge to cure any omission in the charge in a misdemeanor case, and not be required to do so in case of a felony; no reason why he can reach any error in the charge of the court in a civil case by a general exception, or

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in fact by no exception, and yet in criminal cases, of the grade of felony, be required to file a special exception and point out the error, and be absolutely denied this right in a case of the grade of misdemeanor. But such is the law, and so long as it is the law, it will be respected and followed, and as the law has thus been written, we cannot consider such complaints of the charge of the court, nor the failure to give the special charges requested, unless fundamental error be presented, and this law will be applied to all alike when called to our attention in future.

There are a great number of grounds stated in the motion for new trial, and we have carefully reviewed each of them and each bill of exception filed in the record, and none of them present reversible error. The evidence in the case shows that appellant received a very large amount of whisky, shows a number of sales, and evidence of each sale was admissible as tending to show that appellant was engaged in the business and occupation (Robinson v. State, 66 Tex. Crim. Rep., 392, 147 S. W. Rep., 245). The testimony as a whole fully supports the verdict.

The judgment is affirmed. *Affirmed.*

DAVIDSON, PRESIDING JUDGE (dissenting).—I think the indictment should charge distinctly and affirmatively that the alleged sales occurred while the accused was pursuing the business of selling intoxicants. The statute requires that at least two sales be made while the accused party is engaged in the prohibited business of selling intoxicants. The two sales, or more sales, would not be sufficient unless they occur while the party was engaged in such business.

In regard to the procedure relating to exceptions to charging the jury, I have heretofore written to some extent. I will when time affords write at some length my views of such practice and what is sufficient under the present statutory provisions.

[Rehearing denied January, 1913.—Reporter.]

CLARENCE EDWARDS V. STATE.

No. 2182. Decided January 8, 1913.

Theft—Statement of Facts.

In the absence of a statement of facts, the charge of the court and the refusal of the continuance without bill of exceptions cannot be considered on appeal.

Appeal from the District Court of Tarrant. Tried below before the Hon. R. H. Buck.

Appeal from a conviction of theft; penalty, three years confinement in the penitentiary.

The opinion states the case.

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No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was convicted of theft of property over the value of fifty dollars, his punishment being assessed at three years confinement in the penitentiary.

This record is before us without bills of exception or statement of facts. The motion for new trial is based on the ground, first, that the court refused to give the special instructions requested by appellant. In the absence of the statement of facts we cannot say this was error. The charge requested by appellant may not have been called for in the evidence which was admitted, or may have had no relation to the case as made on the trial. Second, nor can the alléged error of the court refusing continuance be considered, because bill of exceptions is not contained in the record.

The judgment is affirmed.

Affirmed.

W. T. RHODES V. STATE.

No. 2143. Decided January 8, 1913.

Rehearing Denied February 19, 1913.

1.—Assault to Murder—Misconduct of Jury—Allusion to Defendant's Failure to Testify.

Where the bills of exception, concerning the misconduct of the jury alluding to defendant's failure to testify, were signed by the trial judge about sixty days after the adjournment of the court and were to the overruling of the motion for new trial and not to the introduction of testimony, there was no reversible error; besides, the testimony, if considered, did not show such misconduct of the jury as to require a reversal.

2.—Same—Evidence—Examining Trial Testimony.

Where, upon trial of assault to murder, the defendant, in order to impeach or contradict the main State's witness, offered the entire examining testimony of the said witness, without laying a predicate therefor, and no part of the testimony was pointed out which defendant sought to impeach, there was no error in refusing same.

3.—Same—Evidence—Letter.

Where, upon trial of assault to murder, the State introduced a letter written by the defendant to a State's witness about a week after the alleged assault, trying to induce the witness to leave the country, there was no error; besides, the bill of exceptions was defective.

4.—Same—Evidence—Conclusion of Witness.

Where, upon trial of assault to murder, the defendant endeavored to introduce in evidence the conclusion of the main State's witness to the effect that she believed defendant did not aim to hurt her, there was no error in excluding same.

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5.—Same—Evidence—Declarations of the Defendant.

Upon trial of assault with intent to murder, there was no error in introducing in evidence the declarations of the defendant made before the alleged assault, to the effect that he was going to see his children if he had to wade in blood up to his chin; other testimony showing that he shot the injured party who was his divorced wife when she forbade him to come to see said children.

6.—Same—Sufficiency of the Evidence.

Where, upon trial of assault with intent to murder, the evidence sustained the conviction, there was no error.

Appeal from the District Court of Grayson. Tried below before the Hon. J. M. Pearson.

Appeal from a conviction of assault with intent to murder; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Cox & Cox and *Jas. L. Cobb,* for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—This conviction was for assault to murder, the minimum punishment being assessed.

The facts show that appellant and his wife were not living together. He went to the residence of his wife where their two children were also living, and while there made an assault upon her by shooting at her with a pistol. After appellant shot at her she ran and he chased her in the front yard and a scuffle ensued, during which the wife said she heard the pistol click. She finally succeeded in taking the pistol away from him. The same facts are substantially in evidence by another witness.

The first bill of exceptions was reserved to the action of the court overruling the motion for new trial. Attached to the motion for new trial is the affidavit of the juror Hickman in which he states that while in the jury room one of the jurors remarked to affiant that "if defendant had testified in this cause as to where he was going with the pistol, or what he was intending to do with it, we could get together and give defendant a lower penalty." That such conversation and discussion of the testimony occurred while deliberating on the case. The juror who talked with affiant works at the Nursery Farm, in Sherman, Texas. That the exact language of the jurors and the conversation had about defendant failing to testify was not remembered by the witness, but the fact that the defendant did not testify was spoken of as above related. It is also stated in the affidavit that the charge of the court was not read or referred to in the jury room, and some one of the jury remarked, "It is not worth while to read the charge." The State made reply upon three grounds, which are unnecessary here to state, signed by the county attorney. The evidence set out in the bill and connected with the motion for new trial is, in substance, as follows:

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The juror Phillips testified that during the deliberation of the jury after their retirement and before the verdict was reached, he did not recollect any conversation in reference to the defendant having failed to testify in the case on his own behalf. On cross-examination he said he would not be positive whether anything was said about it or not; if there was he did not hear it.

Andrews, another juror, testified, "I heard a remark about it is all. That was when we first went in the room, some one remarked that we won't consider his not testifying in his own behalf. If anything else was said I did not hear it." This juror did not remember which one of the jurors made the remark. On redirect examination the juror stated that some one made that remark, but he did not know why the remark was made, or what caused it to be made.

The juror Gee testified he heard no reference to the failure of defendant to testify until after the verdict had been written out. He further states on cross-examination, "Somebody said something about him not testifying and I made the remark that he didn't have to. I don't know as I could say how many of them talked about it. We talked about it being a short case, and after a while some one made the remark about him not testifying, and I told them he didn't have to. I did not say I wondered why the defendant didn't testify in the case." He said he did not consider the fact that the defendant did not testify.

Brimlee, another juror, testified that the jury did not consider the defendant's failure to testify so far as he recollected. He did not hear it discussed along about the time the verdict was being framed about the defendant having failed to testify. It could have happened, the juror says, and he might not have heard it. They were all pretty close together, and if anything was said about it he says he did not hear it.

Park, another juror, said: "I did not hear anything said in the jury room in reference to the failure of defendant to testify as a witness. I couldn't say it occurred. I would not swear it did not occur, but I think I would have heard it because I was sitting at the table with all of them. I think I heard everything said in the jury room. I did not hear a remark at any time when it was said he wondered why defendant had not testified in the case.

Nash, another juror, testified: "If during the discussion anything was said concerning the failure of defendant to testify as a witness I never heard it. If it was discussed about defendant having failed to testify, and some one said he did not have to testify unless he wanted to, I did not hear it. I did not hear that in the jury room before we came out."

The juror O'Neal testified that he did not think anything was said in reference to defendant's failure to testify before the verdict was reached and signed. On cross-examination he said: "I think there was something said about it after the verdict was rendered; my recol-

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lection is there was not anything said about it until after the verdict was rendered."

Hickman, the juror who made the affidavit, said that he remembered something was said about defendant's failure to testify, but he did not remember exactly what it was. This juror identified Brimlee as the man who made the remark, but he did not remember whether it was before or after the verdict was signed.

Under the authorities it would seem if this matter could be considered at all, it is not of sufficient importance to require a reversal. The bill of exceptions was signed about sixty days after adjournment of court, and it was a bill to the overruling of the motion for new trial and not to the introduction of the testimony.

Bill No. 2 recites that the appellant wished to introduce the entire examining trial testimony of the witness, Stella Rhodes, the assaulted party. There was no predicate laid for the introduction of this testimony, and the court sustained all objections. The purpose for which this testimony was offered, if for anything at all, which may be indirectly gathered from the bill, was to contradict the witness, Mrs. Rhodes, but what part of her testimony was offered for that purpose is not stated. If we look to the record of the facts and the testimony given before the examining trial it is almost a reproduction one of the other. There is no part of it pointed out sought to be impeached, and the attorney offering the testimony, in answer to questions, failed to point out any part of it, although requested to do so by the court.

Bill of exceptions No. 3 was reserved to the action of the court, permitting a letter written by the defendant to Mrs. Rhodes on July 23, 1911, about a week after the assault, to be introduced in evidence. It is unnecessary to go into a discussion of this matter. The grounds of objection are not stated, and an inspection of the letter, at least some portions of it, shows it was material and pertinent. Among other things, writing of the transaction which formed the predicate for this prosecution, to-wit: shooting at the woman with his pistol, he said: "I am sorry that this ever happened, so please do not appear against me in court. I will be good to you and the children the rest of my time, and do anything I can for you. If you want to go, please let me know and I will get the money together. Stella, I will see you and the children right soon, and will do what I told you I will do. I will do all I can." Among other things, he said: "Stella, if you and the children will leave Sherman when the time comes in August, I will pay your way and back. I am going to work in the ditch in the morning, and then the first of August at the shop, and I will help you all I can. I will give you all the money I can Saturday night. I will guarantee you I will help you, and do what I can. Stella, do not be afraid of me; I will not bother you. I guess I can't get to see my children any at all. That is awful." This testimony was admissible as showing he was trying to induce the witness to leave the country, at least leave Sherman and not appear against

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him as a witness in the case. That is the effect and purport of the letter.

Another bill of exceptions recites that while the prosecuting witness, Mrs. Rhodes, was on the stand, and after locating the place and time, defendant proposed to prove that she stated to the witness Armstrong that she did not believe defendant aimed to hurt her, and she knew it, or words to that effect, or in substance that. The county attorney objected on the ground that it was hearsay, a conclusion of the witness, and no predicate was laid for its introduction. The court sustained the objection. Appellant's counsel said: "I want to get a little further, if since that time the witness made that statement, the prosecuting witness and the only witness to the shooting, if she made that statement, it would show the position and light in which she viewed the situation at that time, if she made any statement about that afterwards, after the alleged offense was charged, to outside parties who were not interested in the matter, it would have a bearing upon the defendant's position in the case, as well as her own." The court sustained the objection, and appellant was not permitted to ask if she had not made the statement to Armstrong. The State's objection was properly sustained.

Another bill recites that while the witness Butridge was on the stand, testifying in behalf of the State, he was asked the following question, after he had testified that he had had a conversation with the defendant: "Q. What statement did he make to you in regard to it? Mr. Cobb: In reference to what? Mr. Freeman: I will state to the court what I expect the witness to testify. Mr. Cobb: I object to any statement defendant made him you are talking about; any statement made by defendant with reference to his intention so far as the children are concerned. Any statement that he might have made in reference to the children I don't think would be admissible to this jury to show any malice toward prosecuting witness. Mr. Freeman: Will your Honor hear the testimony? It is in the nature of a threat."

Without stating further these questions and matters, the witness was permitted to testify in the hearing of the jury, as follows: "He stated that he believed he could get along with his wife if it weren't for other people butting in. I believe he went so far as to say his mother-in-law, and that he was going to see his children when he got ready, if he had to wade in blood up to his chin." This testimony, we think, was admissible in connection with what occurred shortly afterward. He went to see the children, and his divorced wife prohibited him coming to see them any more, and it was then the shooting occurred.

Another bill of exceptions recites the defendant proposed to prove by the witness Armstrong that Mrs. Rhodes told him that she did not believe defendant intended to hurt her. This was subsequent to the transaction; it was her opinion of the matter, and was not admissible.

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We think the evidence is sufficient to justify the conclusion reached by the jury in their verdict, and the judgment is affirmed.

Affirmed.

[Rehearing denied February 19, 1913.—Reporter.]

C. G. BAKER v. STATE.

No. 2084. Decided January 8, 1913.

Rehearing Denied February 5, 1913.

1.—Game Law—Killing Deer—Date of Offense.

Where, upon trial of unlawfully killing a wild deer, the evidence sufficiently fixed the date of the offense and that the deer was killed out of season, the conviction was sustained.

2.—Same—Evidence—Self-serving Declarations.

Upon trial of unlawfully killing a wild deer, there was no error in excluding the self-serving declarations of defendant after the commission of the offense.

3.—Same—Information—Signature.

In the absence of a bill of exceptions showing that the information was not signed by the county attorney, the same cannot be considered on appeal; besides, the record showed that the information was so signed.

4.—Same—Charge of Court—Date of Offense.

In the absence of a bill of exceptions to the court's charge in a misdemeanor case and requested charges thereon, the same cannot be reviewed. However, where the date of the offense could not have misled the jury under the court's charge, there was no error.

Appeal from the County Court of San Saba. Tried below before the Hon. J. T. Hartley.

Appeal from a conviction of unlawfully killing a wild deer; penalty, a fine of $10.

The opinion states the case.

N. C. Walker, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—Appellant was charged, by proper complaint and information, with unlawfully killing a wild deer on or about August 1, 1911, within the time from January 1st to November 1st, 1911, convicted and fined $10,—the lowest fine.

The most material question is appellant's contention that the evidence is insufficient to sustain the verdict. The statement of facts is brief and we have read and studied it several times and have reached the conclusion that the evidence is sufficient to sustain the verdict. The State proved by Will Franklin that he was with appellant when appellant killed a deer at what is known as the Clark tank in A. Behren's pasture in San Saba County, Texas; that they were watching

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this tank for deer and one came up; appellant shot it and it ran off about a hundred or two hundred yards east of the tank,—he thinks it was east—and fell dead. They dressed it and took it home with them that night. He says, "I think that this happened sometime in the summer of 1909, about the month of August. It might possibly have been in the year 1910, but I believe that it was in the year 1909." He then shows they went out to the place in a buggy, but couldn't get the buggy on the inside of the pasture, as the pasture gate was locked so that they left the buggy outside and climbed over the fence. He says, "I am sure this was not in 1911 and this was the only time that I was ever with the defendant when he killed a deer," and that deer was the only one, so far as he knew, that defendant ever killed; that they cut the feet off the deer and removed its hide and entrails and left the entrails and feet where it fell.

Anno Bherens and also Otto and Alvin Behrens, three witnesses, each testified that about August 1, 1911, they were out in their father's, A. Behren, pasture, known as the Clark pasture, in which was located a tank known as the Clark tank and that about 5 o'clock that evening they came upon the defendant, who was at the tank; they spoke to him and passed on. Saw no one else with him then; that appellant was at the time standing near a buggy which was close to the tank inside of the pasture; that three or four days after this they came back to this tank looking after some cattle, and their attention was attracted to a bunch of cattle bellowing and pawing about something southwest of the tank about 200 yards; they went to the place and found where a deer had been killed, the blood signs, entrails and three of the deer's feet were still there. The entrails showed to have been pawed around a right smart, but seemed to have been tolerably fresh. All three of these witnesses were positive and certain that this was about the first day of August, 1911, and fixed the time by reason of the fact that they had bought some cattle from Wilson and had just branded them and were watching them to prevent worms from getting in them.

Appellant testified that he was with the witness Franklin when he killed a deer at said tank in 1909; that it was about 10 o'clock at night and a bright moonlight night; that he shot the deer and it ran off about 100 yards east of the tank and fell; that they dressed it where it fell and brought it to town with them that night. He says they left their buggy outside of the pasture and climbed over, because the gate was locked so that they could not get their buggy in; that he had been in said pasture several times during the last two or three years bee hunting and deer hunting; that he did not kill a deer in said pasture in 1911. "It might be possible that I killed one there in 1910, but I think not." That he had not been in that pasture where he and Franklin killed this deer, with his buggy for nearly three years, because the gates were locked.

Anno Behrens testified, in rebuttal, that at the time he saw the deer

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feet and entrails in the pasture the gates near the tank were locked; that they began locking them in the latter part of 1909 or first part of 1910, in cold weather, but sometimes left them unlocked when they were riding in the pasture. This is in substance the whole of the testimony. It is perfectly clear therefrom that appellant killed a deer at said tank on or about August 1st. Whether it was in 1909, 1910, or 1911, is the sole question. Appellant and Franklin thought it was in 1909, though each, in substance, testified that it might have been in 1910; they both were positive that it was not in 1911. The three other witnesses were positive that it was in 1911, and they fixed the date by other facts and circumstances. The discrepancy of the location from the tank, where the deer fell, is by no means controlling. Franklin thought it was 100 or 200 yards from the tank and he first said east, then he said he thought it was east. Appellant said it was about 100 yards east from the tank. The Behrens say that it was about 200 yards southwest from the tank. The Behrens show that they did not lock the gates of the pasture near the tank during the summer of 1909, and not until the latter part of 1909, or the first part of 1910, and even then that the gates were sometimes left unlocked when they were riding in the pasture. It is shown by them that they were riding in this pasture at that time; they all three swear that they saw the appellant at the tank on or about August 1, 1911, and he does not dispute that.

It is clear that if he killed the deer in August, 1911, he was clearly guilty, and, we think, the evidence is sufficient to sustain the jury in their finding that the deer was killed by him in August, 1911, but if they were mistaken as to the year, the appellant and the witness Franklin say that while it was in 1909, it might have been in 1910; if it was either 1910, or 1911, the evidence was sufficient to sustain the conviction and in either event, we think, the evidence was sufficient to justify the jury to find,—first, that it was in 1911, and if not, it was in 1910.

The proposed testimony appellant offered by Edwards that he, appellant, had told Edwards that some time in the summer of 1909, that he and Will Franklin had killed a deer the night before at the Clark tank in Behrens' pasture, was properly excluded by the court on the objection of the State that it was hearsay and a self-serving declaration.

It is claimed by appellant, in his motion in arrest of the judgment, that the county attorney had not signed the information herein. This is in no way authenticated by bill of exception, from the court. The information contained in the record is properly signed by the county attorney; so that as the matter appears, the court did not err in overruling his motion in arrest of judgment.

In his motion for new trial appellant complains that the court erred in submitting the case to the jury for a finding, wherein he charged that if they believed from the evidence beyond a reasonable doubt

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that he, on or about the 1st day of August, 1911, as charged in the information, and within two years next before the 13th day of May, 1912, killed a wild deer, as charged, to find him guilty, because the period of two years from May 13, 1912, would embrace the time from November 1, 1910, to January 1, 1911, and from November 1, 1911, to January 1, 1912, at which time it was no violation of the law to kill a wild deer. The appellant took no bill of exceptions to this feature of the court's charge and requested no written charge at the time to correct it. Hence, the question is not presented in such a way that we can properly review it. However, all the evidence was directed to the killing of a deer on or about August 1, either of 1909, 1910, or 1911, and no injury could have resulted to appellant because of this mistake by the court in embracing said period of time when it was not unlawful to kill a deer.

The judgment will be affirmed.

Affirmed.

[Rehearing denied February 5, 1913.—Reporter.]

HENRY POLK V. STATE.

No. 2134. Decided January 8, 1913.

1.—Gaming—Keeping Gambling House—Indictment.

Where, upon trial of keeping and being interested in keeping certain premises for the purpose of being used as a place for gambling, the indictment charged an offense under the laws of the State, the same was sufficient.

2.—Same—Severance—Different Courts.

Where the indictment of defendant's codefendant was pending in a different court, there was no error in overruling a motion for severance. Following Price v. State, recently decided.

3.—Same—Practice—Names of Witnesses.

Where defendant complained that the names of the witnesses did not appear on the indictment, but defendant was furnished with said names before he announced, there was no error.

4.—Same—Evidence—Oral Testimony—Officer of Club.

Upon trial of keeping a gambling house, there was no error in admitting oral testimony that defendant was the president of the club that had control of the alleged house.

5.—Same—Sufficiency of the Evidence.

Where, upon trial of keeping a gambling house, the evidence sustained the conviction, there was no error.

6.—Same—Charge of Court.

Where the criticisms to the court's charge were hypercritical and too general, they need not be considered, and there was no error in the refusal of requested charges which were not applicable to the facts.

Appeal from the Criminal District Court of Dallas No. 2. Tried below before the Hon. Barry Miller.

Appeal from a conviction of keeping a gambling house; penalty, two years imprisonment in the penitentiary.

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Omitting formal parts of the indictment, the same alleged "did then and there unlawfully keep and was interested in keeping certain premises and a certain building and a certain room and a certain place there situate for the purpose of being used as a place to bet and wager and gamble with dice and cards, and a place to which people then and there resorted to gamble, bet and wager in this, he, the said Henry Polk, did then and there unlawfully keep and was interested in keeping said premises, buildings, room and place there situate for the purpose of being used as a place to bet and wager upon and at games played with dice and cards and as a place to which people then and there resorted to gamble, bet and wager at or upon games played with dice and cards, and people did then and there resort to said premises building, room, and place to bet, wager, and gamble at upon games played with dice and cards and people did then at and in said premises, building, room and place, bet and wager and gamble at and upon games there played with dice and cards, against the peace and dignity of the State."

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, Judge.—Appellant was convicted under the first count of the indictment, wherein he was charged with keeping and being interested in keeping certain premises for the purpose of being used as a place to bet and wager and gamble with cards and dice—a gambling house. This count charged an offense under the laws of this State, and the court did not err in overruling the motion to quash.

The case against this defendant was pending in District Court No. 2 of Dallas County. Appellant filed a request that one Warren Diamond be first placed on trial, representing that his testimony was material to his defense. As the indictment against Diamond was pending in a different court, the judge did not err in overruling the application. (Price v. State, decided at this term, and authorities there cited.)

The appellant complains that the court erred in not postponing the case that he might prepare his defense, as the county attorney had not endorsed on the indictment the names of all the witnesses. In approving the bill the court states: "Before the defendant announced ready for trial the State gave to defendant the names of all the witnesses used on the trial." Under such circumstances the bill presents no error.

In another bill a number of questions and answers of the witness, Gene Hudson, are incorporated. The objections are numerous, but in the light of the qualification of the court none of them present error. The court states the witness testified he knew appellant was president of the club, in the rooms of which the gambling is shown to have taken place, and that Wells, the secretary, also testified appel-

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lant was president of the club. The fact that appellant was president of this club is amply proven by the record, and if some of the questions to this witness might be said to be leading, such fact would not present error under the record in this case. The fact that appellant was president of the club that had control of this house could be proven by those who knew that fact, and there was no error in admitting oral testimony as to such facts.

In this case the evidence would show that a club was organized, and it had its offices and place of business in a certain building; that appellant was president of this club, and that gambling took place in the rooms thereof; that a "take-off" was charged those who gambled, appellant at times collecting this take-off. He is shown to have been present on several occasions while the gambling was going on; in fact, the room seems to have been prepared and kept for that purpose. Appellant's connection therewith is amply proven; in fact he is shown to have been one of the organizers of the club, and its first and only president.

The criticisms of the court's charge are hypercritical, and too general to bring any question before this court for review. The special requested charge should not have been given as it was not applicable to the evidence adduced on this trial.

We have carefully gone over each ground assigned in the motion and none of them present any reversible error.

The judgment is affirmed.

Affirmed.

WILL CRAIN V. STATE.

No. 2192. Decided January 8, 1913.

Rehearing Denied February 5, 1913.

1.—Carrying Pistol—Ignorance of the Law.

Ignorance of the law excuses no one, and it is a violation of the law to carry a pistol even though one should place one part of it in one pocket and another part in another pocket; the pistol being in no way out of repair.

2.—Same—Intent—Charge of Court.

The question of defendant's intent does not enter into the case, where the defendant took the pistol apart and carried it around with him to church and other places of public gatherings, and the only excuse was that he did not know it was against the law.

3.—Same—Charge of Court—Intent—Case Stated.

Where, upon trial of unlawfully carrying a pistol, the evidence showed that the defendant carried the pistol on and about his person at different public gatherings, saying that he wanted the party who gave it to him to redeem it; and that he was found with the pistol, having all the different parts of it in his pocket, there was no error in the court's refusal of a special charge to acquit the defendant if he did not intend to violate the law, and if he took the pistol apart.

4.—Same—Charge of Court—Weight of Evidence.

Where, upon trial of unlawfully carrying a pistol, the charge of the court applied the law to the admitted facts, the same was not on the weight of the

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evidence. Following Cordova v. State, 50 Texas Crim. Rep., 353, and other cases.

5.—Same—Evidence—Firing Pistol.

Where defendant was permitted to testify that he did not fire the pistol, there was no error in permitting testimony that the officer who found defendant in possession thereof heard shooting in that direction.

Appeal from the County Court of Nacogdoches. Tried below before the Hon. E. P. Marshall.

Appeal from a conviction of unlawfully carrying a pistol; penalty a fine of $100 and thirty days confinement in the county jail.

The opinion states the case.

V. E. Middelbrook, for appellant.—On question of intent: Lann v. State, 25 Texas Crim. App., 495; Lyle v. State, 21 id, 153; White v. State, 66 S. W. Rep., 773; West v. State, 21 Texas Crim. App., 427; Underwood v. State, 29 S. W. Rep., 777; Huff v. State, 51 Texas Crim. Rep., 441; Blaire v. State, 26 Texas Crim. App., 387, and cases cited in opinion.

On question of charging on weight of evidence: White v. State, 13 Texas Crim. App., 134; Hardin v. State, 13 Texas Crim. App., 192.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, Judge.—Appellant was prosecuted and convicted of unlawfully carrying a pistol, his punishment being assessed at imprisonment in the county jail for thirty days and a fine of $100.

A witness for the State testified that defendant had a pistol at a gathering at Redland church. That he saw defendant with the pistol in his hands, and saw him load and unload it. Deputy Sheriff Strode says that night he heard some shots fired and went in the direction he heard the shooting; that when he arrived at Monroe Johnson's (where they were having a party) he took a pistol off of defendant; that the cylinder was in his jumper pocket while the remainder of it was in his pantaloons pocket; that it had two empty shells in it. Defendant then took the stand and admitted he had the pistol, both at the gathering at Redland church in the evening, and at the party at Monroe Johnson's that night, claiming that while at Redland church one Dan Clark approached him and wanted to borrow thirty cents, agreeing to pawn him the pistol and pay the money back that evening or night. He denies loading and unloading the pistol at the church, claiming that as soon as Clark delivered it to him he took the cylinder out and put it in one pocket and the remainder of the pistol in another pocket, saying he did not think it was a violation of the law to carry the pistol when in this condition.

Ignorance of law excuses no one, and it is a violation of the law to carry a pistol even though one should place one part of it in one pocket and another part in another pocket. One could soon put the parts

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together, and the intent and purpose of the law is to keep one from carrying deadly weapons on or about his person. The pistol was in no way out of repair; it would shoot when put together as shown by all the testimony, and those cases cited by appellant, where the pistol was so out of repair it could not be fired, have no application. (McCallister v. State, 55 Texas Crim. Rep., 392.)

Appellant gives as a reason for carrying the pistol with him from Redland church to Monroe Johnson's, that as Clark had stated he would redeem it that evening or night, he wanted to have it with him in case Clark came to redeem it. Appellant had no right to carry the pistol at Redland church, and from Redland church to Johnson's, and there have it on his person at a public gathering. The evidence shows that in going from the church to Johnson's he necessarily passed near his home, where he could have deposited the pistol, or if he did not desire to do this, when he got to Johnson's, if he really carried it there to give Clark an opportunity to redeem it, he could have deposited it some where at this place. Instead of doing this he elected to go into a public gathering with the pistol on his person and keep it there. This in law he had no right to do, and as this was a violation of the law, the fact that he did not know it was a violation furnishes no justification for this act. The question of his intent does not enter into the case, for he intended to do the very thing he did do, the only excuse offered being that he did not know it was against the law to thus carry a pistol. This was simply ignorance of the law, and excuses no man. (Cordova v. State, 50 Texas Crim. Rep., 353.)

Defendant requested the court to charge the jury: "You are charged, further, intent is an element to be considered in this case, and if you believe from the evidence that the defendant took the pistol apart and disassembled it for the purpose and with the intention of so fixing it that he would not be violating the law while he was carrying it, then under such conditions he would not be guilty, and if you so find you will acquit the defendant, or if you have a reasonable doubt as to whether he so carried it, you will acquit him." This is not the law, and the court did not err in refusing to give it. If appellant only did the acts he intended to do, believing that same was no violation of law, yet if in fact such acts were prohibited by law, he would be punishable, for all persons are presumed to know what the law prohibits one from doing. (Medrano v. State, 32 Texas Crim. Rep., 214; Thompson v. State, 26 Texas Crim. App., 94.) The question involved in this case is discussed by this court in Chaplin v. State, 7 Texas Crim. App., 87, in which it was held that one who carried a pistol under the belief that it was not a violation of the law to carry it under given circumstances, was a mistake of law and not of fact, and we merely refer to that opinion and the cases following it.

The other special charges requested by appellant also relate to the "intent" and should not have been given under the facts of this case. The court instructed the jury:

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"The defendant had the right to obtain possession of the pistol at Redland Church, as set up in his admission, but the defendant, while he would not violate the law in getting the pistol, as admitted, and carrying same home within a reasonable time and along his way to his home by the ordinary or accustomed route of travel, still the defendant would not have the right to deflect from his accustomed route home and proceed beyond his home more than a mile and retain a pistol on his person at a party for some five or six hours.

"The fact that the pistol, which was intact, in shooting order, and partially loaded at the time defendant received it, was separated by the defendant's taking the partially loaded cylinder from the pistol and carrying the barrel of the pistol in one pocket and the cylinder, as described, in another pocket, would not excuse the defendant in thus carrying said pistol beyond his home and at the party at Monroe Johnson's."

The objection made by appellant is that this charge is upon the weight of the testimony. As the record shows the facts recited were proven beyond doubt, in fact testified to by defendant himself, and all other witnesses, even if upon the weight of the evidence, such fact would not present reversible error. However, the charge was but applying the law to the admitted facts, and this character of charge has been approved by this court in Codova v. State, 50 Texas Crim. Rep., 353, and Zollicoffer v. State, 43 S. W. Rep., 992.

There was no error in permitting the officer to state he heard shooting in a certain direction and went there, where he found appellant in possession of a pistol. The officer could state what attracted his attention, and this would not be injurious. Appellant was permitted to state and introduce other witnesses to prove, that he did not fire the pistol after it came into his possession.

It may be that this defendant carried this pistol to the party at Monroe Johnson's under an honest belief that the owner would redeem it that night, yet this would not authorize him to mix and mingle with the crowd until eleven or twelve o'clock at night with the pistol on his person.

The judgment is affirmed.

Affirmed.

[Rehearing denied February 5, 1913.—Reporter.]

E. L. REEVES V. STATE.

No. 2177. Decided January 8, 1913.

Rehearing Denied February 5, 1913.

1.—Aggravated Assault—Statement of Facts.

In the absence of a statement of facts, the question as to the court's failure to charge on simple assault, and the objection to the argument of counsel cannot be considered on appeal.

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2.—**Same—Jury and Jury Law—Bill of Exceptions.**

Where the complaint that one of the jurors who tried defendant sat on a previous trial of the case was not reversed by bill of exceptions, and no evidence was introduced, the same cannot be considered on appeal.

Appeal from the Criminal District Court of Harris. Tried below before the Hon. C. W. Robinson.

Appeal from a conviction of aggravated assault; penalty, ninety days confinement in the county jail.

The opinion states the case.

R. H. Tierman and *Geo. H. Currier,* for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was convicted of aggravated assault, his punishment being assessed at ninety days' imprisonment in the county jail.

The record is before us without the evidence or bills of exception. The first ground of the motion for new trial alleges that the court erred in failing to charge the jury on the law of simple assault. For the reason the evidence is not before us we are unable to say that this was error. The second ground of the motion complains of the argument of State's attorney. The ground alleges certain conclusions and statements of the prosecuting officer, when in fact the evidence did not justify such statements and conclusions. For the reason that the evidence is not before us this cannot be considered.

It is contended that one of the jurors in this case sat on the previous trial of the case. This is not presented so it can be considered, and there was no bill of exceptions reserved verifying the fact that the juror did or did not sit upon a former trial, nor was there any evidence introduced in connection with the motion for new trial showing this fact, if it was a fact, at least if such was the case the record does not contain it. As this matter is presented we cannot review it.

The judgment is affirmed.

Affirmed.

[Rehearing denied February 5, 1913.—Reporter.]

FRANK WILDER V. STATE.

No. 2191. Decided January 8, 1913.

1.—**Carrying Pistol—Statement of Facts.**

Where, upon appeal from a conviction of a misdemeanor, the statement of facts was not properly filed, the same could not be considered.

2.—**Same—Recognizance—Punishment.**

Where the alleged recognizance did not state the punishment found by the jury, the same was insufficient.

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3.—Same—Special Charges—Statement of Facts.

In the absence of a statement of facts, the refusal of requested charges cannot be considered on appeal.

Appeal from the County Court of Leon. Tried below before the Hon. W. D. Lacey.

Appeal from a conviction of unlawfully carrying a pistol; penalty, a fine of $100.

The opinioin states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, Presiding Judge.—Appellant was convicted of unlawfully carrying a pistol, his punishment being assessed at a fine of $100.

The statement of facts cannot be considered for two reasons—first: there was no order entered of record allowing twenty days after adjournment of court in which to file statement of facts. The case is a misdemeanor, tried in the County Court. The second reason is, if there had been an order, the court adojurned twenty-two days before the statement of facts was filed. For these reasons the statement of facts is not in condition to be entertained on appeal.

It is very doubtful whether the recognizance is sufficient on account of its peculiar verbiage, inasmuch as it does not state the punishment. It does state, however, that defendant was fined not less than one hundred dollars. The verdict of the jury and judgment of the court based thereon fixes the punishment at exactly one hundred dollars. We are of opinion, if it was necessary to decide that question, that the recognizance is not sufficient. The statute requires that the punishment found by the jury must be stated. The jury assessed the punishment at a fine of one hundred dollars.

The first ground of the motion contends that there was material error committed by the court in refusing to submit defendant's special instructions. This cannot be considered in the absence of the evidence. The other grounds relate to the sufficiency of the evidence, and cannot be considered for the same reason.

The judgment is affirmed.

Affirmed.

Jake Jefferson v. State.

No. 2189. Decided January 8, 1913.

Murder—Jury and Jury Law—County of Residence—Practice on Appeal—Bill of Exceptions.

Where the question, that the juror was incompetent because he was not a legal resident of the county of the prosecution was raised for the first time in the motion for new trial, the same could not be considered on appeal; besides, defendant accepted the qualification to his bill of exceptions which showed that the juror was a legal resident of said county.

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Appeal from the District Court of Falls. Tried below before the Hon. Richard I. Munroe.

Appeal from a conviction of manslaughter; penalty, three years imprisonment in the penitentiary.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, and *Tom Connally*, and *Frank Oltorf*, for the State.—On question of accepting qualification of bill of exceptions: Mays v. State, 36 Texas Crim. Rep., 437; Williamson v. State, id, 225; Sutton v. State, 31 Texas Crim. Rep., 297; Lane v. State, 29 Texas Crim. App., 310; Leeper v. State, id, 63.

HARPER, JUDGE.—Appellant was prosecuted under an indictment charging him with murder, and convicted of manslaughter.

The only matter complained of in a way we can review it is presented in bill of exceptions No. 1, wherein it is claimed that W. H. Blaylock was an incompetent juror, in that he was not a legal resident of Falls County at the date of this trial. The testimony adduced when this motion was heard is not brought up in the record, consequently we must accept the conclusion of the judge on the evidence. In approving the bill he states: "On the presentation to the court of the affidavit attached to defendant's motion for new trial, and upon the hearing of said motion, the court heard oral testimony as to the qualification of the juror Blalock. The juror testifies that he had lived in Marlin, Falls County, Texas, prior to 1911; that he married there and lived there afterwards; that he moved to Taylor, Texas, and lived for a while, but removed to Marlin in December, 1911, and that he moved all of his household goods, etc., to Marlin; that he went to Oklahoma, intending, if he should find a satisfactory business location, to live there; that he left his household goods at Marlin, and regarded Marlin as his home until such a time as he should find a satisfactory location and should establish a permanent home; that he paid his poll tax in Falls County, Texas, in January, 1912; that he did not find a satisfactory location in Oklahoma and for that reason returned to Marlin, and was residing there at the time of being summoned as a juror. The court after hearing the evidence, and the testimony of the juror, found as a fact that the juror's legal residence was in Falls County, Texas, and that he was a qualified juror in said cause." The defendant accepts the bill as qualified by the judge, and the testimony not being before us, and the record being in this condition, we must conclude that the court did not err in holding the juror a legal resident of Falls County and a qualified juror. In addition to this it is too late to raise it for the first time in motion for new trial.

The judgment is affirmed.

Affirmed.

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W. M. FORRESTER v. STATE.

No. 2150. Decided January 8, 1913.

1.—Receiving Stolen Property—Charge of Court—Ordinary Diligence.

Where defendant was prosecuted for receiving stolen property knowing it to have been stolen at the time he received it, a charge of the court that if defendant did not know by the exercise of ordinary diligence that the property was stolen, etc., was reversible error, as defendant must have received the property with a fraudulent intent to convert to his own use and deprive the owner of the value thereof. Following Bray v. State, 41 Texas, 203, and other cases.

2.—Same—Evidence—Other Offenses.

Where it was not shown that another theft was connected with the theft for which defendant was being prosecuted as receiving the property stolen, but the two transactions were independent of each other, and this evidence was not properly limited, the same was reversible error.

3.—Same—Evidence—Accomplice.

Upon trial of receiving stolen property, the acts and declarations of the persons alleged to have stolen the property after the theft, in the absence of the defendant, were inadmissible; and especially, where the same was not properly limited by the court.

Appeal from the District Court of McLennan. Tried below before the Hon. Richard I. Munroe.

Appeal from a conviction of knowingly receiving stolen property; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Williams & Williams, for appellant.—On question of insufficiency of the evidence: Johnson v. State, 42 Texas Crim. Rep., 440; Murio v. State, 31 id, 210; Arcia v. State, 26 Texas Crim. App., 193; Nourse v. State, 2 id, 304.

On question of admitting accomplice testimony after offense was committed: Richardson v. State, 75 S. W. Rep., 505; Cooper v. State, 29 Texas Crim. App., 8.

On question of other offenses: Bismarck v. State, 45 Texas Crim. Rep., 54.

On question of caution and ordinary diligence: Charles v. State, 36 Fla., 691, and cases cited in opinion.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was convicted of receiving stolen property, knowing it to have been stolen at the time he received it. The evidence discloses that two women, Pearl Forrester and Monta McGowan, were in the City of Waco and went to the store of Sanger Brothers. While McGowan was trying on a lot of different dresses, she testified, Pearl Forrester slipped a dress under her clothing in some way and disappeared with it from the store. Shortly afterwards, McGowan says, she went to where Pearl Forrester was and received instructions from her to go to the express office and forward

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a box that she had left there to Albert Taylor at Fort Worth; that she obeyed instructions. The theory of the State is that the dress taken by Pearl Forrester was in the box and was expressed to Taylor in Fort Worth. Taylor was in Dallas. He was 'phoned, McGowan says, by Pearl Forrester to go to Fort Worth and get the box from the express office. Appellant went to Fort Worth, in accordance with the request, and signed for the box the name of Albert Taylor and received it. Not a great while afterwards he was arrested and held in custody. The State's theory is that the box contained the stolen dress and that appellant received it knowing that it was stolen. It is shown that appellant did not open the box when he received it and did not know the contents.

1. In this state of the case, after charging the jury that if he knowingly received the property, etc., he would be guilty, submitting the issues for the defendant, the court thus charged the jury: If you believe from the evidence defendant received the property alleged to have been stolen, did so at the request of Pearl Forrester and Monta McGowan, or either of them, and that he did not know that the said dresses were stolen or did not receive said goods under circumstances sufficient to satisfy a man of ordinary intelligence and caution that said dresses were stolen, you will acquit him, etc. Exception was reserved to this charge and we think the exception was well taken. Appellant's criminality in this case would not depend upon whether he exercised ordinary diligence and caution to ascertain whether the dresses were stolen or not. The statute requires that he must know the goods to have been stolen when he received them. Knowledge on his part is essential and not only so, but the fraudulent intent must exist as well at the time he received the goods. The mere reception of stolen property is not criminal. As before stated, there must be knowledge on his part that the goods were stolen and he must receive them with the fraudulent intent to convert them to his own use, and deprive the owner of the goods of their value. This question has been decided so frequently that it is hardly necessary to cite authorities, but the statute requires that the defendant must receive the goods knowing them to be stolen, and on the question of caution, etc., see Bray v. State, 41 Texas, 203; Neely v. State, 8 Texas Crim. App., 64; Pressleh v. State, 13 Texas Crim. App., 95; Boyd v. State, 18 Texas Crim. App., 339; Price v. State, 40 Texas Crim. Rep., 428; Thomas v. State, 54 Texas Crim. Rep., 377; Charles v. State, 36 Fla., 691.

2. Another matter is presented for revision, to wit: the introduction of evidence showing that two women committed the theft of a diamond ring subsequent to the theft of the dress. It is not shown to have been in any way connected with the dress matter, but independent of that matter and in the absence of the defendant. We are of opinion that as this matter is presented in the record the evidence should have been excluded. This same matter came up and was discussed in Bismark v. State, 45 Texas Crim. Rep., 54; see note also 62 L. R. A.,

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317; also 98 Am. St. Rep., 174. Sometimes it becomes admissible to show extraneous crimes to connect the defendant, develop the res gestae and show system and intent as it relates to the crime charged and upon which the accused is being tried. In this particular case if it should become necessary, upon another trial, to develop this evidence against the principals, the two women, then the court's charge should limit it to the purpose for which it was introduced. The ring alleged to have been stolen was taken subsequent to the time the dress was said to have been stolen. That was an independent transaction. The ring was not shipped in the box with the dress and was in no way connected, so far as appellant was concerned, with this transaction. If the two women had been upon trial for the theft of the dress it would have been necessary for the court to have limited this evidence in his charge to the jury to the purpose for which it was introduced. This statement is made upon the theory that the State brought it within one of the exceptions to the general rule which would exclude this character of testimony. The court failed to give any limitation on this evidence, either as against the principals, the two women ,or the defendant. This was error.

3. There is another matter of which complaint is made. The court permitted the accomplice, Monta McGowan, who turned State's evidence, to testify in substance that Pearl Forrester told her (McGowan) in the absence of appellant and after the goods had been shipped or expressed, that the dress stolen from Sanger Brothers was in the box expressed to Fort Worth. Various objections were urged to this testimony. Under the authority of Richardson v. State, 75 S. W. Rep., 505, and Cooper v. State, 29 Texas Crim. Apps., 18, we are of opinion this testimony was inadmissible. Appellant was not present; the theft had been completed and Pearl Forrester was not on trial. These were acts and declarations by the co-conspirators after the theft, when neither one of them was on trial, but it was sought to use this against appellant, who was not in any way connected with the theft, and if guilty at all was guilty on account of receiving the box at Fort Worth. If Pearl Forrester had been upon trial for the theft of the goods, any declaration that she might make about the matter, after the commission of the offense, would be evidence against her but not against the defendant for receiving stolen property, but even if the matter was admissible against Pearl Forrester in making out the case of theft against her as principal, the charge should certainly have limited the evidence, so far as defendant was concerned, to that purpose. The accomplice McGowan could not corroborate herself by testifying to a statement or confession of Pearl Forrester, and if the evidence was admissible at all it could be only admissible against Pearl Forrester and should have been so limited by the court in its charge.

For the errors indicated the judgment is reversed and the cause is remanded.

Reversed and remanded.

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BEN LANE V. STATE.

No. 2138. Decided January 8, 1913.

1.—Theft—Venue—Charge of Court.

Where, upon appeal from a conviction of theft, the defendant asked a peremptory charge of acquittal, and the bill of exceptions did not give the evidence on the question of venue but referred to the statement of facts, the same could not be considered on appeal, and under Article 938, Code Criminal Procedure, there was no reversible error. Following Conger v. State, 63 Texas Crim. Rep., 312; besides, the venue was sufficiently proven.

2.—Same—Practice on Appeal—Venue.

Where the evidence shows no venue and a contest is made on that point as required by law, it is not decided that in every instance the want of evidence showing venue must be shown by a bill of exceptions.

3.—Same—Evidence—Fruits of Crime—Statutes Construed—Arrest.

Where the evidence showed that what was said and done between defendant and the officer resulted in the recovery of the stolen property, there was no error under Article 810, Code Criminal Procedure, although defendant was under arrest at the time.

4.—Same—Ownership—Husband and Wife.

Where, upon trial of theft, the ownership was alleged in the wife, and the property was community and in the actual possession of the wife at the time it was stolen, there was no error under Article 457, Code Criminal Procedure.

5.—Same—Want of Consent.

Where the alleged stolen property was community and the ownership alleged in the wife and want of consent shown on her part, there was no error.

6.—Same—Evidence—Declarations of Third Party.

Where, upon trial of theft, the declarations of a third party with reference to the taking of the property was admitted in evidence in connection with defendant's declarations as to the same at the same time, there was no error; nor was there error in admitting testimony as to the efforts which were made to find the property.

7.—Same—Indictment—Description of Money—Statutes Construed.

Where the allegation in the indictment as to the description of the alleged stolen money was sufficient under Articles 458 and 468, Code Criminal Procedure, there was no error. Following Sims v. State, 64 Texas Crim. Rep., 435.

8.—Same—Charge of Court—Value.

Where the uncontroverted evidence showed that the money alleged to have been stolen was over the value of fifty dollars, a complaint that the court's charge assumed the value of the property to have been proven, there was no error, besides, the court's charge was not subject to such criticism.

9.—Same—Charge of Court—Fraudulent Intent.

Where the court's charge on fraudulent intent was in substantial accord with approved precedent, there was no error.

10.—Same—Charge of Court—Venue.

Where, upon trial of theft, the court's charge required the jury in order to convict defendant that he fraudulently took the property and converted it to his own use in the county of the prosecution, a complaint as to the court's charge on venue was not well taken.

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Appeal from the District Court of Angelina. Tried before the Hon. James I. Perkins.

Appeal from a conviction of theft; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, Judge.—Appellant was convicted of the theft of property over the value of fifty dollars, and his punishment fixed at the lowest prescribed by law.

It is unnecessary to give but a brief statement of the evidence. About August 10, 1911, Mrs. Laura Best and her husband took the T. & N. O. Railroad train at a little station just south of the county line of Angelina County. This railroad extends from Beaumont to Dallas, running through Angelina County from the south practically towards the north, Angelina County being a long county north and south. Mrs. Best had with her in her hand-bag 19 twenty-dollar bills, 2 five-dollar bills, 1 two-dollar bill, 1 one-dollar bill, and 15 cents in coin. She and her husband with their two children went from Rockland, just south of the south line of Angelina County, to a station in Angelina County north on a north bound train on said railroad. She placed the hand-grip or satchel on the seat, and when they got out of the train forgot it and left it on the seat. She was going to visit her sister, who lived a short distance from the station where they got off, and as soon as she reached her sister's, shortly after she got off the train, she missed the money. Her husband went back at once, wired the conductor of the train, and took other means to recover the lost satchel or grip and the money. Very soon after she got on the train the appellant, who was the "Butch" or newsboy on the train, passed along where she had been sitting and his attention was called to the hand-bag by a lady passenger who sat on the seat just behind where Mrs. Best and her husband had been. He then took it, carried it back to his box where he kept his papers and articles of merchandise. He claims he did not immediately look into the hand-bag to see what was in it, but put it in his box. He said he knew that it was not his and he had no right to it, and that all such articles that are left on the train should be turned over to the conductor or train auditor; that he did not do this. He says he did not immediately look into the hand-grip to see what was in it, but soon did so, and that when he did so he found the $393.15 in it. That he took the money out of the hand-bag and put it in his pocket and threw the bag out of the window. He first testified that he did this before the train reached the town of Huntington, which is only about half way through the county on said railroad from the south to the north line thereof. He afterwards attempted to show that he did not know when or where the train was when he did

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this, but that it was further north, and perhaps not in Angelina County. When the train got to Nacogdoches, which is the county seat of the next county north of Angelina County, the conductor got a telegram inquiring for this grip. The telegram, as he understood, meant an ordinary black grip such as are carried usually by travelers with articles of clothing therein, and that he did not at the time think it meant a lady's hand-bag, satchel or grip such as is usually carried by ladies. That as soon as he got the telegram and the train started out of Nacogdoches north he went entirely through the train hunting and inquiring and examining for such an article. That the appellant knew that he was looking for that article left by said lady; that the appellant then had the money in his pocket, but did not then tell the conductor about it, or of his having found and taken charge of the said lady's grip and its contents. The conductor inquired of him about it, and searched in and about his box for it, but could not find it. Of course he did not, as the appellant then had the money in his pocket, and had thrown the grip out of the window. That from time to time afterwards the conductor went through the train inquiring for this hand-bag, when the appellant himself would inquire of the conductor whether or not he had got "any more dope on that." The appellant repeatedly asked the conductor this after the conductor began to hunt for said grip or hand-bag, but at no time did appellant tell him that he had it or had gotten it, but when the conductor searched his box and under the seat about his box, he denied having it.

It seems the sheriff of Angelina County wired the police or sheriff's department at Dallas to arrest appellant for the theft of said money. The telegram did not reach Dallas in time for the officer to meet the train upon its arrival, but when he went to the station at Dallas that night the train had arrived, the passengers had dispersed and appellant had left the depot, and he could find out nothing about it that night. The next morning, shortly before a train on this same road was to go south from Dallas back to Beaumont, the sheriff went to the news agent's department and met appellant in the room. He did not know him. He asked appellant for the news agent. Appellant pointed him out. Upon inquiry of the news agent for appellant, the news agent pointed out appellant there in the room, all three being present at the time. The sheriff told appellant that he had a telegram stating the amount of money that was in said hand-bag or grip, and to arrest him if he did not give up the money, but that if he would deliver the money, not to arrest him. The appellant denied having the money or knowing anything about it, but showed to the sheriff a telegram to himself to the effect that if he would return the money he would be rewarded therefor, and he said to the sheriff, "If I had the money I would return it for the reward," and not only refused to give up the money, but denied having it, or any knowledge of it. The sheriff arrested him and took him off to the courthouse about a half mile distant. The sheriff kept accusing him of having the money, and telling him if he

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would give it up he would turn him loose under his instructions. Appellant still denied having the money or knowing anything about it, but said that in order to be protected if he would let him see his mother she would put up the money for him in order to keep him from being arrested and prosecuted. The officer told him no, if he did not have the money his mother nor any one else could put it up for him, and told him he would have to take him to jail. Upon starting from the courthouse to the jail with him, appellant then told him if he would go back to the depot with him he would get and deliver the money to him. The sheriff went back with him; appellant went in behind some place in the news room, reached back in some place where he had the money hid or concealed and delivered it to the sheriff. The money so delivered by him at the time to the sheriff was the 19 twenty-dollar bills and 2 ten-dollar bills. The sheriff told him and showed him the telegram that that was more money than Mrs. Best had. The appellant told the sheriff he had taken out the small money and put in two ten-dollar bills instead, and the sheriff turned over one of the ten-dollar bills to him and had him get the change, and appellant turned over to the sheriff the exact amount of money, and kept the balance of the change himself. Appellant testified that he had the two-dollar bill and the one-dollar bill in his pocket at the time, but did not deliver or turn that particular money over to the sheriff.

It seems that appellant's main contention is that the evidence fails to show the venue of the theft in Angelina County, and he asked a peremptory charge of acquittal, which was refused. The charge does not state that it was on that ground, but appellant contends that that is the reason for asking said peremptory charge. Our statute, Article 938, Code Criminal Procedure, says: "In all cases the (appellate) court shall presume that the venue was proven in the court below * * * unless made an issue in the court below, and it affirmatively appears to the contrary by bill of exceptions properly signed and allowed by the judge of the court below * * * and incorporated in the transcript as required by law." No such bill is contained in the record. Appellant did take a bill to the court's refusal to give a peremptory instruction to acquit him. In his bill to the refusal of the court to give his peremptory instruction he states that he excepted to the action of the court in refusing his said peremptory charge, because the State at that time had wholly failed to prove venue in the case, and wholly failed to show that appellant had formed the intent to appropriate the hand-bag or satchel or the money described in the indictment in Angelina County. The court, in approving the bill, said: "Allowed in connection with statement of facts and as therein qualified and explained." The bill nowhere attempts to give the evidence on this subject, and we cannot properly consider the question of venue when only thus raised. Neither are we required to go to the statement of facts to ourselves hunt out and see if there was such proof, when the appellant in his bill does not do so, and the court refers us to the

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statement of facts for that purpose. This bill is wholly defective on that account, and we are not required to pass upon the question. This court has repeatedly so held. Burt v. State, 38 Texas Crim. Rep., 397. As stated by us in Conger v. State, 63 Texas Crim. Rep., 312, in speaking of such a defective bill, "The judge, in allowing this bill, qualified it by stating this: 'With the request that the statement of facts be referred to in connection with this bill.' This but illustrates the necessity for the bill of and within itself containing all that is necessary for this court to determine the question. The work of this court would be interminable if, in order to see whether the questions raised were or were not admissible, it had to undertake to hunt them out in a record containing,—a statement of facts alone,—of 130 pages." However, we have gone over and read the statement of facts fully, and while it contains 28 pages of closely typewritten matter, we have found ample evidence which would establish or authorize the jury to find that the venue was proven, and that appellant stole the money in Angelina County. We have given the substance of some of it in the statement of the case above. The court committed no error in refusing to give appellant's peremptory charge on said ground claimed by him or any other.

We do not intend to hold that where the evidence shows no venue, when contested on that point clearly in the court below, that in every instance the want of evidence would have to be shown by a bill.

By one of his bills appellant claims that the court erred in permitting the sheriff of Dallas County to testify to what occurred, and what was said by him to appellant and appellant to him about the money at Dallas, because appellant was then under arrest. It is true, appellant was then under arrest, but it is also clear and true that what was said and done between the parties at the time resulted in the recovery of the stolen property. Our statute, Article 810, Code Criminal Procedure, expressly provides that the confession of appellant, although under arrest and not in writing, when appellant thereby makes statements of fact or circumstances that are found to be true, which conduce to establish his guilt, such as finding of secreted or stolen property, etc., are admissible. This confession of the appellant was clearly authorized and not prohibited under our statute.

Another point is made by appellant to the effect that the stolen property belonged to the husband, A. J. Best, and not to Mrs. Best, his wife, as charged in the indictment. The proof on this point clearly shows that the stolen money was community property of the said husband and wife, but it also clearly shows that the husband had turned it over to his wife and put it in her custody, and that she so had it for their benefit. Under our law community property belongs to both the husband and the wife, and Article 457, Code Criminal Procedure, expressly provides: "Where one person owns the property, and another person has the possessioin, charge, or control of the same, the ownership thereof may be alleged to be in etiher. Where property is

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owned in common, or jointly, by two or more persons, the ownership may be alleged to be in all or either of them." In this case it was proper to have alleged the ownership of the property in either the husband or the wife, but as she had possession, charge and control of the same at the time, there is no variance between the proof and the allegations in any respect.

And there was no error of the court in permitting Mrs. Best to testify that appellant took the said money, and hand-bag containing it, without her consent, as objected to by one of appellant's bills.

Neither did the court err in permitting the conductor to testify that while he was looking for the grip or hand-bag, after getting the telegram, that one of the lady passengers on the train told him that there was a lady who got off and left her hand-bag, when the defendant "butted in" and said, "Yes, I saw it lying there." Appellant's objection to this testimony seems to be to what the lady told the conductor, claiming that it was a statement made by a passenger not in his presence. This testimony objected to on its face shows that it was in appellant's presence and hearing, and that he "butted in" and replied thereto and stated that such was the fact himself. This bill seems to embrace in a very general way complaints of the conductor testifying to what he did in having received a telegram and in response hunting through the train for the lady's hand-bag or grip. The court in allowing the bill says he allows it so far as it is specific, but not as to generalities. It does not show any reversible error whatever in any contingency.

There is nothing in appellant's contention that the indictment is defective in that it fails to sufficiently describe the money stolen. It is described in the indictment as "nineteen twenty-dollar bills, the same then and there being United States paper currency money, each of the value of twenty dollars, two five-dollar bills, United States paper currency money, each of the value of five dollars, one two-dollar bill, United States paper currency money of the value of two dollars, one dollar bill, United States paper currency money of the value of one dollar, and fifteen cents in silver coin of the United States of the value of fifteen cents, the whole aggregating in the value of three hundred and ninety-three dollars and fifteen cents." This allegation was clearly sufficient under our statutes, articles 468 and 458, Code Criminal Procedure, and the decisions noted thereunder. See also Sims v. State, 64 Texas Crim. Rep., 435; 142 S. W. Rep., 572, and cases there cited.

There is no error in the court's charge to the effect, in submitting the case to the jury, that if they believe from the evidence beyond a reasonable doubt that appellant fraudulently took the property described in the indictment from the possession of Laura Best, and it was of the value of fifty dollars or more, his complaint being that this authorized the jury to find the defendant guilty for the taking of any amount, whether the same be more or less than fifty dollars in value, and that it was a charge upon the weight of the testimony.

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There would be no error in this anyway, because the uncontroverted proof shows that the money stolen by appellant was $393.15.

The charge of the court on fraudulent intent, and meaning thereof, and applying it to the appellant for unlawfully taking the said money, is substantially in accordance with such charges as have been uniformly approved by this court.

There was no error in that paragraph of the court's charge where he tells the jury, "If the defendant took the hand-bag in Angelina County and at the time of the original taking formed the intent fraudulently to take its contents, if found to be of value, and afterwards, upon finding the hand-bag contained money, he took the money with the intent to deprive the owner of its value and to appropriate it to his own use or benefit, then, in such case, the fraudulent taking of the money would relate back in point of time and place to the original taking and would be a fraudulent taking in Angelina County, and it would in such case be immaterial where or what county he was when he discovered that the hand-bag contained money and actually appropriated it, if he did appropriate it," as against the objections that such charge was unwarranted, and that no venue was shown by the evidence, and that the evidence did not show that the contents of the satchel or hand-bag were known to appellant while in Angelina County. The court in his charge repeatedly required the jury to find that appellant fraudulently took the property and converted it to his own use in Angelina County, and if they did not so find that he did in Angelina County, to acquit him.

We have carefully considered the record in this case and all points raised by appellant, and find no error that would justify this court to reverse the case. The judgment is therefore affirmed.

Affirmed.

TOM DURHAM & MRS. HARRIS V. STATE.

No. 2254. Decided February 5, 1913.

Rehearing denied April 2, 1913.

1.—Fornication—Statement of Facts—Time of Filing.

Neither bills of exception nor statement of facts in County Court cases filed in the lower court after adjournment can be considered by this court unless an order is made during term time authorizing such filing. Following Hamilton v. State, 65 Texas Crim. Rep., 508.

2.—Same—Statutes Construed—Precedent.

The Act of May 14, 1907, p. 446, on the subject of filing statement of facts in the County Court in misdemeanor cases is still in force and is not changed by the enactments of the Revised Statutes of 1911, Civil or Criminal. Following Mosher v. State, 62 Texas Crim. Rep., 42.

3.—Same—Legislative Intent—Official Court Stenographer.

The Legislature has made a distinction between statement of facts and the filing of same where there is an official court stenographer and where there is not; and also in felony cases, where there is an official court stenog-

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rapher, and in misdemeanor cases in the County Court where there is not such stenographer.

4.—Same—Statutes Construed—Independent Statement of Facts.

The Act of May 1, 1909, p. 374, provided that nothing in that Act shall be so construed as to prevent parties from preparing statement of facts on appeal independent of the transcript of the notes of the official shorthand reporter, and thus did not expressly repeal that part of the Act of 1907, p. 509.

5.—Same—Duty of Codifiers.

Under the Act of March 19, 1909, p. 130, the codifiers were simply authorized to adopt such of the Revised Statutes, Civil and Criminal, as had not been repealed or amended, and that they should not change the words or punctuations thereof except in cases of evident, clerical or typographical errors, etc.

6.—Same—Statutes Construed—Former Law—Repeal.

While the codifiers of the Civil Revised Statutes of 1911 copied the various sections of the various Acts, etc., including the Act of 1909, p. 374; yet, in the Act of 1911, adopting said Revised Statutes, the laws of that Session were not affected by the repealing clause of said Act, and by the Act of March 31, 1911, p. 264, of that Session, the Act of 1909, supra, which had been copied in said Revised Codes, Civil and Criminal, was expressly repealed, and the Act of May 14, 1907, supra, was in no way affected or repealed.

7.—Same—Rule of Construction—Repeal by Implication.

See opinion for a full discussion of the rules applicable with reference to the abrogation of particular legislation and repeal by implication, etc.

8.—Same—Case Stated—Statement of Facts—Filing in Misdemeanor Cases.

Neither the Revised Statutes, Civil and Criminal, nor the Act of March 31, 1911, p. 264, repeal or otherwise affect the Act of May 14, 1907, p. 446; and a statement of facts in a County Court misdemeanor case must be filed within term time, unless an order of the court during term time is made authorizing it to be filed within twenty days after adjournment; and it must be filed within the time so allowed and which cannot be extended beyond twenty days. Following DeFriend v. State, 153 S. W. Rep., 881.

Appeal from the County Court of Potter. Tried below before the Hon. W. M. Jeter.

Appeal from a conviction of fornication; penalty, a fine of $50.

The opinion states the case.

C. A. Wright, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.—On the question of filing statements of facts and bills of exception: Mosher v. State, 62 Texas Crim. Rep., 42; Chaney v. State, 62 id. 67; Griffin v. State, 62 id, 98; Looper v. State, 62 id, 96; Harwell v. State, 62 id, 117; Dilliard v. State, 62 id, 321; Davis v. State, 62 id, 537; Misso v. State, 61 id, 241.

PRENDERGAST, JUDGE.—Appellants were jointly charged, tried and convicted of fornication and each fined $50.

The term of court at which they were tried convened August 6, 1912, and adjourned October 5, 1912. There is no order of the court below authorizing the filing of the statement of facts or bills of exceptions

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after the adjournment of court. What appears to be a statement of facts and bills of exceptions were filed herein on October 18, 1912, some fifteen days after the adjournment of the court.

The Assistant Attorney-General has made a motion to strike out the statement of facts and bills of exceptions, because not authorized to be filed by the court after adjournment. It has been the long and uniform holding of this court that neither bills of exception nor statement of facts in county court cases, filed in the court below after adjournment, can be considered by this court, unless an order is made during term time authorizing this. The motion of the Assistant Attorney-General is therefore granted. Hamilton v. State, 65 Tex. Crim. Rep., 508; 145 S. W. Rep., 348, and cases there cited.

Without a statement of facts and bills of exceptions none of the matters attempted to be raised by appellants in their motion for new trial can be considered. The judgment is, therefore, affirmed.

Affirmed.

ON REHEARING.

April 3, 1913.

PRENDERGAST, JUDGE.—It is only necessary to pass upon the question of whether or not the court was correct in the opinion heretofore rendered in striking out, on motion of the Assistant Attorney-General, the statement of facts because filed after the adjournment of the court without any order allowing this to be done.

This court in the case of Mosher v. State, 62 Texas Crim. Rep., 42, after repeated consultations, thorough consideration and investigation by all the Judges of this court, held that the Act of May 14, 1907, page 446, was still in force, notwithstanding the various Acts theretofore and thereafter passed on the subject of statement of facts in County Courts in misdemeanor cases which had no court stenographer; and that the several acts therein recited, including the Act of May 1, 1909, page 374, did not apply to County Court criminal cases, but as to criminal cases applied only to cases in the District Court which had a regular court stenographer. We have again carefully considered these various enactments, including the enactments of the Revised Statutes of 1911, civil and criminal, and the Act of the Thirty-second Legislature, 1911, page 264, and are of the opinion that so far as the filing of statement of facts in the County Court in criminal cases is concerned, the law is the same now as it was when the opinion in the Mosher case was delivered.

The various laws and enactments by the Legislature up to that time, April 5, 1911, were given in said Mosher case. It is manifest and clear to us from this legislation on this subject that the Legislature has all the time intended to make, and has made, a distinction between statements of facts and the time of filing thereof where there was an official court stenographer, and where there was not; and also in felony

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cases where there was an official court stenographer, and in misdemeanor cases in the County Court, where there was not. The titles, and repealing clauses, to these various Acts, as well as the enactments themselves, show this. Thus, the title to the Act of May 1st, 1909, p. 374, is:

"An Act providing for the appointment of official stenographers for District and County courts and County Courts at Law by the judge thereof, and prescribing their qualifications and duties, and providing for their compensation, and prescribing the time and method of making up and filing statements of facts and bills of exception in cases tried in such courts, and repealing Chapter 24 of the Acts of the First Called Session of the Thirtieth Legislature of Texas and all other laws and parts of laws in conflict herewith, and declaring an emergency." Sec. 14 repealed expressly the Act of 1907, p. 509, but said, "provided that nothing in this Act shall be so construed as to prevent parties from preparing statements of fact on appeal, independent of the transcript of the notes of the official shorthand reporter," and then another proviso that the Act should not be retroactive.

The duty of the codifiers, by the Act of March 19, 1909, p. 130, providing for them, expressly stated their duty to be: "To make a complete revision and digest of the laws, civil and criminal, of the State of Texas, and annotate the same in accordance with the provisions of this Act. Said commissioners shall adopt such of the Revised Statutes, Civil and Criminal, *as have not been repealed or amended,* together with an appropriate arrangement of titles, articles, marginal references and chapter head lines, *and shall not change the words or punctuations thereof* except in cases of evident clerical or typographical errors; or to improve the verbiage or make clear the meaning of the text, provided the present numbering or arrangement of the articles is not required to be preserved."

The revisers in the Civil Revised Statutes of 1911, copied the various sections of the various Acts on the subject in said revision, and especially the various sections of said then latest Act of 1909, p. 374; and in said revised Code of Criminal Procedure, Articles 845 and 846, copied those sections of said Act of 1909, which they thought applied to criminal cases only. But it is especially noticeable that theretofore whenever the various Legislatures had adopted revised Penal Codes and Codes of Criminal Procedure, they expressly repealed all laws not therein contained. Not so with said revised Codes of 1911. There is no such repealing clause whatever. But in the very Act adopting said Codes, Sec. 4 thereof, on page 325, is: "Nothing in this Act shall be construed or held to repeal, or in any wise affect, the validity of any law or Act passed by this legislature in its regular session." On this same subject the Act of 1911, adopting said Revised Statutes, civil, in Sec. 17, p. 1720, says: "That no laws, general or special, enacted by the thirty-second legislature, shall be in any way affected by the re-

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pealing clause of this title; but any and all such laws shall continue to be the law of this state, this Act of revision to the contrary notwithstanding." Then said same Legislature which adopted said Codes, civil and criminal, at its same regular session, enacted the Act of March 31st, 1911, p. 264, which was intended to take the place, and did entirely take the place of said Act of 1909, which had been copied in said revised Codes, civil and criminal, *and expressly repealed said act of 1909;* and, of course, thereby repealed all of it which had been copied in said Codes. Said Act of 1911, which was clearly in lieu and instead of said 1909 Act, in no way affected or repealed said Act of May 14, 1907, p. 446, and was not intended to do so, as held and shown of the Act of which it is in lieu by the opinion in said Mosher case.

The rules applicable to this question are specifically stated in 1 Lewis, Sutherland Statutory Construction, and are to this effect: "When the legislator frames a statute in general terms or treats a subject in a general manner, it is not reasonable to suppose that he intends to abrogate particular legislation to the details of which he had previously given his attention, applicable only to a part of the same subject, unless the general Act shows a plain intention to do so." Page 530, sec. 274.

Again, in the same section on pp. 526-7-8 it is said: "It is a principle that a general statute without negative words will not repeal by implication from their repugnancy the provisions of a former one which is special, local, or particular, or which is limited in its application, unless there is something in the general law or in the course of legislation upon its subject-matter that makes it manifest that the legislature contemplated and intended a repeal." Again: "It is also a rule that where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special Act will prevail in its application to the subject-matter as far as coming within its particular provisions."

In section 272, page 523, it is said: "An Act to revise and consolidate the various acts on a general subject will not repeal a particular act relating to some branch of that subject which is omitted from the revision and whose subject-matter is not covered by it." Also in section 273, page 524-5, it is said: "A later law which is merely a reenactment of a former does not repeal an intermediate act which has qualified or limited the first one, but such intermediate act will be deemed to remain in force, and to qualify or modify the new act in the same manner as it did the first." Again: "Where a law is substantially re-enacted it is said to show that the legislature did not regard it as repugnant to an intermediate act to some extent covering the same subject."

Numerous authorities from various States and courts are cited in said work to sustain the texts above quoted.

In the case of W. E. Berry v. State, from Medina County, decided by

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this court March 19, 1913, we held that an Act of the Legislature prescribing an offense and punishment therefor, passed in 1899, was not repealed by being left out of the said Revised Criminal Code of 1907.

So in this case we hold that neither the Revised Statutes, civil or criminal, nor the said Act of March 31st, 1911, page 264, repeals or otherwise effects the said Act of May 14, 1907, page 446; and that a statement of facts in a County Court misdemeanor case must be filed within term time, unless an order of the court during term time is made authorizing it to be filed within twenty days after adjournment. In the event the County Court within term time allows this twenty days or any days within twenty, the statement of facts must be filed within such time, and the time cannot be extended longer than twenty days. In this holding we follow what we believe is the intention of the Legislature. The Legislature, and it only, has the power and authority to legislate on this subject, and if a longer or different time is desired, it must be prescribed by the Legislature and not by this court.

This court has been consistent in its holdings in all misdemeanor cases on this subject. It is unnecessary to collate the large number of cases. The latest reported is De Friend vs. State, 153 S. W., 881, decided February 5th, 1913, in an opinion by Presiding Judge Davidson, the same day the original opinion herein was handed down.

The motion for rehearing is overruled.

Overruled.

CLAY CLOUD V. STATE.

No. 2093. Decided February 12, 1913.

1.—Murder—Charge of Court—Self-defense—Seeking Explanation.

While it is the settled law of this State that if one learns another is circulating reports detrimental to him, he may seek an explanation and thereby does not forfeit his right of self-defense, yet, where no threats are made or communicated to defendant and there are no facts which would create in any reasonable mind a present danger of death or serious bodily injury, and from the State's point of view, the idea that deceased was making any hostile demonstration at the time of the homicide was excluded, a failure of the court to charge on self-defense is not error.

2.—Same—Evidence—Declarations of Deceased.

Where the declarations of the deceased occurred long before the homicide, did not amount to a threat against the defendant and had no connection with the difficulty which ended in the loss of deceased's life, there was no error in excluding same.

3.—Same—Charge of Court—Manslaughter—Circulating Slanderous Reports.

Where, upon trial of murder, there was evidence that the deceased circulated slanderous statements concerning the defendant of which the latter had notice and thereupon called upon the deceased to retract said statements which the latter refused to do, this in itself was not adequate cause and there was no error in the court's failure to submit this as a cause for manslaughter.

4.—Same—Adequate Cause—Slanderous Reports.

A slanderous report in regard to anyone is not made statutory adequate cause, and unless adequate cause existed and the same produced such anger,

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etc., as to render the mind incapable of cool reflection, the homicide is not reduced to manslaughter.

5.—Same—Charge of Court—Manslaughter—Provocation.

Where, upon trial of murder, the evidence showed that defendant's mind was aroused to anger by slanderous reports made by deceased concerning defendant, this in itself was not adequate cause, and the court's charge on manslaughter requiring that the provocation must arise at the time of the commission of the offense, but that all the facts and circumstances in evidence must be considered, was no error.

6.—Same—Charge of Court—Adequate Cause—Insult to Female Relative.

Slanderous reports made by deceased concerning the defendant cannot reduce the homicide to manslaughter by the application of the law of insult to a female relative, as the latter is a statutory ground, while slanderous reports have never been declared to be adequate cause.

7.—Same—Charge of Court—Murder.

Where, upon trial of murder, the evidence raised the issue of murder in both degrees, there was no error in charging the jury as to the two degrees of murder.

8.—Same—Argument of Counsel—Reading Law.

In the absence of a bill of exceptions, complaints to remarks of counsel and reading law to the court cannot be reviewed.

9.—Same—Evidence—Contradicting Witness.

Where defendant's witness testified on the trial to a different state of facts to which he testified on the examining trial, there was no error in admitting so much of the witness's statement as would show a contradiction.

10.—Same—Jury and Jury Law—Misconduct of Juror.

Where the testimony concerning the want of qualifications of a juror was filed after adjournment of court, the same cannot be considered on appeal; besides, the court did not err in overruling a motion for new trial on this ground.

11.—Same—Sufficiency of the Evidence—Punishment Not Excessive.

Where, upon trial of murder, the State's case showed that the deceased was about to prosecute defendant for sodomy and declined to retract the statements he had circulated with reference thereto, when defendant shot and killed him, a conviction of murder in the second degree, assessing a penalty of twenty-five years imprisonment in the penitentiary was well warranted.

Appeal from the District Court of Wise. Tried below before the Hon. J. W. Patterson.

Appeal from a conviction of murder in the second degree; penalty, twenty-five years imprisonment in the penitentiary.

The opinion states the case.

Jameson & Spencer and *R. F. Spencer, Jr.*, for appellant.—On question of excluding declarations of deceased: Owen v. State, 52 Tex. Crim. Rep., 65; 105 S. W. Rep., 513; Burnam v. State, 61 Tex. Crim. Rep., 51; 133 S. W. Rep., 1045.

On question of court's failure to charge on self-defense: Thomson v. State, 49 Tex. Crim. Rep., 384; 93 S. W. Rep., 111, Williams v. State, 70 S. W. Rep., 756; Shannon v. State, 28 S. W. Rep., 687; Knight v. State, 66 Tex. Crim. Rep., 335; 147 S. W. Rep., 26.

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On question of court's failure to charge that the circulation of slanderous reports and the refusal to retract is adequate cause: Young v. State, 54 Texas Crim. Rep., 417; Redman v. State, 52 id, 591; Branch's Digest, Sec. 442.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, Judge.—In this case it appears that deceased had been circulating some very slanderous reports in regard to appellant's conduct; in fact, charging him with sodomy. Appellant was informed of this fact, and he says he could not rest nor sleep, but the question here presented is one that has often been before the courts of the country—can we take the law into our own hands, or must we appeal to the duly constituted authorities if wrongfully accused? Upon being informed that deceased was circulating these reports, appellant arms himself and goes to the home of deceased. But we will let him tell it in his own language to see whether the issue of self-defense is raised or not. He testified:

"My name is Clay Cloud; I am the defendant in this case; and am 20 years old; was born in Tennessee, and have lived in Texas 18 years. My father is dead; cannot tell when he died; I have not seen him since I was two years old. My mother is now Mrs. Thacker. They have been married 12 or 13 years. I have lived in this county, the last time, about two or three years. I came to Wise County about five years ago; came by myself. My mother and her husband had not moved there then. I stayed here then about a month. I moved to Wise County the last time three years ago, lived here two years and then moved to Dallas County, lived in Dallas County one year, then moved back to Wise County. I was acquainted with Henry Craig; I got acquainted with him about a year before I went to work for him. I made a contract to work for him last year. I made that contract with him in March of last year. I was to do general farm work for him, and to work for him until crops were laid by. I worked for him, I think, three months.

"The first disagreement or trouble that occurred between Craig and myself: I came in from chopping cotton, put out some hay for the horses; he accused me with having intercourse with a mare. I denied it. He drew his knife on me, called me a God d—— son of a b——; told me if I denied it any more he would kill me. That occurred at the lot gate. When he drew his knife he got it from his right pocket. It was a three-bladed knife, something like three or three and one-half inches long. I told him I didn't want to have any trouble with him. I finally went on, put out some hay, and went to the house. Nothing else occurred there that night. The next morning I called for my time and he refused to pay me. He said he did not want to turn me loose; he didn't have money right then and he couldn't turn me loose; wouldn't do it. With reference to the trouble the night before, he said he was mistaken; that he was mad; been working with the binder

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and was hot, mad, and not to pay any attention to that; to just go ahead and work. I did go on and work. The next conversation I had with him about quitting was in about two weeks, and was somewhere close to the house. I had been wanting to go to Oklahoma; told him in a month after I went there I wanted to go just as soon as he would let me loose, and he said he would. I told him that I wanted money; that I wanted to go to Oklahoma; he said no, he could not turn me loose that time; begged me to stay longer. He said, 'If you want to go for what I said a few days ago, you need not pay any attention to that. I told you I was mistaken.' I asked him in about eight or ten days then to let me loose. He says, 'Well, by God, if you want loose I will just pay you and let you go.' That was all that was said. He paid me and I went off.

"During the time I was working for Craig I kept company with Miss Ludie Splawn. I would sometimes go to see her every Sunday; sometimes would go every week or two. I would go with her to church, singing and prayer meeting. I thought a heap of the girl. I was in love with her. She was my sweetheart. I left Craig's place the 6th of June, and went to Oklahoma; stayed there about a month and came back to Fort Worth. At that time my mother and people lived in Dallas County. They were farming there. There was a fellow that came down from Oklahoma with me and we got supper and he had watch and I went back to their house after my watch and stayed there about twenty minutes and caught the 9 o'clock passenger train to Fort Worth.

"Dr. Simmons told me he heard there was some bad talk going on about me. I said 'Who is talking it?' He said he understood Henry Craig was telling around over the country that I had intercourse with a mare. I told him that was mighty bad talk. I told him it was not true.

"I went to Fort Worth and went to work there and worked about a month and then went to Dallas County. In Fort Worth I was employed by the street car company. I came back to Wise County in December of last year and lived at my stepfather's house, Mr. Thacker's. I stayed there until the killing. I had a little talk with Clyde Woods about this report Friday morning before the killing. The killing was on Friday morning. It was the morning before; the killing was the next day. In that conversation he told me that he heard that Henry Craig was making some bad talk about me. He wanted to know if it was true. I told him no, it was not. On the day before the killing I had a talk with my cousin, Allie Thacker, at the lot at our house. He told me that he heard there was some mighty bad talk going on in the country. I asked him what was it and he said Henry Craig, he understood, was talking around over the country I had intercourse with a mare. I told him it was not so. This was just about sundown. Hearing these reports made me feel bad, worried, because I did not want any such talk going on me. I did not eat supper that

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night, and did not rest any that night, you might say. I did not rest because I was roused up. I ate mighty little breakfast. When I left the house I decided to go and talk to Craig. While I was working for Craig he told me that he had a fight with a fellow in Oklahoma and carried a gun for him. I saw other exhibitions of temper on his part. He would get mad, fall in fits of anger, and beat his stock unmercifully.

"On the morning of the killing I decided to go and have a talk with Craig about this matter. I carried a 38-Winchester rifle with me. We had other firearms at the house; had a shotgun and a pistol. I took the Winchester because he could see it and I thought it would keep him from jumping on me. My cousin, Allie Thacker, went with me. We got to the place of the killing somewhere between 7 and 8 o'clock. I called Henry out and told him I wanted to talk to him. He came down there, spoke to us before he got to us; came down where we were. I says, 'I understand that you are talking around over the country that I had intercourse with one of your mares.' He said, 'I did.' I asked him kindly to take it back, and he said he wouldn't take nothing back. I asked him the second time. He says, 'I will take nothing back.' I asked him again the third time. He said, 'No, by God,' wasn't going to take it back. He could prove it and was going to prove it. That roused my mind. Craig was standing at the east side of the trough, leaning over on it. I had my Winchester down by my side. It was so he could see it. He seemed to be angry, mad; raised up off the trough and dropped his right hand to his pocket, right front pocket, threw his left hand up to his breast and made a step towards me. When he made that step towards me I threw up my gun and shot him. When he put his hand to his pocket I thought he intended to kill me. I had seen an expression on his face indicating anger. I fired the gun because I thought he was going to kill me or hurt me, and I was going to protect myself. I shot him the first time, and he made another step towards me with his right hand down in one pocket and the other one up to his breast. From the time he got turned I had my gun on him, leveled on him, and it was too late to check the last shot."

The court refused to charge on the issue of self-defense, and if it is raised by any testimony, it is raised by this testimony of the defendant. The testimony offered in behalf of the State would exclude the idea that deceased at the time was doing any act which would justify defendant in slaying him, and would show that deceased had been summoned to appear before the grand jury; that appellant knew that deceased was making these statements in regard to him, and would authorize a conclusion to be drawn that the defendant killed deceased because of such statements, and because he feared a prosecution on the charge. It is the settled law of this State that if one learns another is circulating reports detrimental to him he may go and see the person in regard to such matters without forfeiting his

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right to defend against an unlawful attack threatening his life or serious bodily injury, and even the fact that he takes a weapon with him does not abridge the right, if the circumstances are that he has reason to believe there is threatened danger to his life. But this appellant testifies as to no threat on the part of deceased to do him bodily harm, nor does he testify that anyone had communicated any threat. He does testify that a long time before the fatal difficulty on one occasion deceased had cursed him and drew a knife on him; but also testifies that deceased subsequently apologized to him and admitted he was in the wrong. If all this is true, what fact or circumstance does appellant testify to which would cause any man to reasonably believe that his life was in danger, or he was in danger of serious bodily injury. Appellant admits he armed himself, went to deceased's house, called him out, and demanded that he "take back" the statement that appellant was guilty of sodomy. Upon deceased declining to do so, he again made the request or demand that he do so, when deceased stated he would not and could prove that appellant was guilty. Appellant admits this made him angry, and he says deceased then "dropped his right hand to his right front pocket," raised up off the trough on which he was leaning, took one step, when he fired. This is all the danger or appearance of danger any witness puts in the case, and when we take into consideration that appellant sought the meeting, carried a weapon with him, was making demands or requests of deceased, the facts and circumstances in the case must be such that would create in any reasonable mind a present danger of serious bodily injury or death, before he would be authorized to take life. The acts and conduct of the deceased at the time, viewed in the light of the testimony of defendant alone, were not such as to create in any person's mind a reasonable apprehensioin of death. And when we take the testimony offered in behalf of the State, it is apparent that appellant was then in no serious danger, and the wounds in the body show that deceased was not, at the time the shots were fired, advancing towards appellant, the bullets having entered in the back about an inch and a half from the spinal column. It is true, the right to live and defend one's life is born and bred into every living thing, and is firmly engrafted into our law; yet human life is a sacred thing; when once taken it cannot be restored, and before this issue of self-defense is raised in a case, it must be reasonably apparent, under the circumstances, that there were at least some grounds for the person to believe that he was then and there in danger of losing his life. If, as it is amply shown by the record, deceased had circulated these reports, if they were untrue, as contended by appellant, it would have been far more consistent with good citizenship for him to have appealed for relief to the courts of his country than to have placed himself in a position where it has become incumbent to defend a more serious charge, that of having taken the life of his fellow-man. Had the evidence shown that deceased had threatened the life of appel-

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lant, and these threats had been communicated to defendant, a different question would be presented, for then slight demonstrations will raise the issue. But under the evidence of defendant himself, no reason is shown why deceased should or would desire to take his life, and no reason for him to think that deceased did so desire. This disposes of the most serious contention in the case, but there are several other grounds in the motion, one being that the court erred in not permitting the witness Bob Avery to testify deceased had told him that "appellant had got to talking smart to Lucille around the house, and he had gone to see him about it," etc. As this had occurred long before the difficulty, while appellant was working for deceased, and no witness says this had anything to do with the difficulty when deceased lost his life, there was no error in the ruling of the court.

As we have held that the issue of self-defense was not raised by the testimony, there was no error in the court refusing the three special charges relating thereto.

The court also refused to give the fourth special charge requested, which reads as follows: "Gentlemen of the jury: If you find from the evidence that before the killing the deceased had made slanderous statements about the defendant, and the defendant was informed thereof and went to see the deceased to demand a retraction of such statements, and that when he did approach the deceased the deceased reaffirmed the charge or slanderous statements, and you find that by reason of the reaffirmance the defendant's mind was thereby rendered incapable of cool reflection and that in such state of mind he killed the deceased, the offense would only be manslaughter." The charge as requested is not the law. The fact that one's mind was rendered incapable of "cool reflection" would not alone be sufficient to reduce the offense to the grade of manslaughter. Our statute provides that two things must coincide, and that is, that adequate cause, as defined in law, must exist, and this must produce a degree of anger, rage, resentment or terror as to render the mind incapable of cool reflection.

A slanderous report in regard to a man is not made statutory adequate cause by our Code, and unless "adequate cause" existed, and this produced anger, rage, resentment or terror, even though the killing took place when the mind was incapable of cool reflection, the offense would not be reduced to manslaughter.

Murder in the first degree is where one forms the design to kill with a cool and sedate mind. Murder in the second degree can only arise where the killing is under such circumstances as necessarily implies that the design to kill was formed when the mind was not cool and deliberate and capable of cool reflection. That the mind may be in this condition will not in and of itself reduce an offense to the grade of manslaughter. The court in his charge did submit the issue of manslaughter, the only criticism of which is couched

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in the following language: "Because the court erred in the first subdivision of his charge on manslaughter wherein the jury is told that, 'the provocation must arise at the time of the commission of the offense, and that the passion is not the result of a former provocation.' Said charge being a limitation of the rights of the defendant as to the determination by the jury of the condition of his mind at the time and before the killing it being clearly in evidence that on divers occasions prior to the killing the deceased had used slanderous language and statements about the defendant which was calculated to render the mind of the defendant incapable of cool reflection on a meeting with the deceased at any time as shown by bill of exception No. 7." The court, in addition to the subdivision criticised, also instructed the jury: "Although the law provides that the provocation causing the sudden passion must arise at the time of the killing, it is your duty in determining the adequacy of the provocation (if any), to consider in connection therewith, all the facts and circumstances in evidence in the case, and if you find that, by reason thereof, the defendant's mind at the time of the killing was incapable of cool reflection, and that said facts and circumstances were sufficient to produce such state of mind, in a person of ordinary temper, then the proof as to the sufficiency of the provocation satisfies the requirements of the law, and so in this case you will consider all the facts and circumstances in evidence in determining the condition of the defendant's mind at the time of the alleged killing, and the adequacy of the cause (if any) producing such condition."

As stated above, slanderous reports circulated about a man are not statutory "adequate cause," and the court was not in error in instructing the jury that the provocation must arise at the time of the commission of the offense, when he also instructed the jury in determining the "adequacy of the provocation" that they should consider all the facts and circumstances in evidence. Appellant is seeking to apply the law of "insult to a female relative" to slanderous reports about a man, but this we are not authorized by the Code to do. "Insult to a female relative" is declared by statute to be "adequate cause," while slanderous reports in regard to a man have never been declared so to be. The charge of the court on manslaughter is not subject to this criticism.

The evidence fully authorized the court to submit both murder in the first and second degree, and there was no error in the court so doing.

We cannot review those complaints in the motion complaining of the remarks of counsel for the State, nor the fact that they were permitted to read from law books and opinions, as these complaints are not verified in any way—no bill of exceptions having been reserved.

As appellant's cousin, Allie Thacker testified on this trial to a dif-

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ferent state of facts to which he testified on the examining trial, there was no error on the part of the court in admitting so much of such statements as would show the contradictory statements.

The only other ground in the motion relates to whether or not T. A. Scott was a qualified juror. We have read the evidence, although it was not filed until after the adjournment of the term of court at which appellant was tried, consequently it is not presented in a way that would cause a reversal of the case. (Probest v. State, 60 Texas Crim. Rep., 608.) And having read the evidence, we cannot say that the court erred in holding that he was qualified. (Subdivision 13, Art. 692, Code Crim. Proc.)

We have carefully read this record and are of the opinion that the evidence amply supports the verdict of the jury, finding appellant guilty of murder in the second degree. The testimony would show, from the State's standpoint, that deceased caught appellant, while working with him, copulating with his mares; that he discharged him for such conduct, and told him if he would leave the country he would not report it. That appellant did leave and remained away for some months, but finally returning, deceased was summoned before the grand jury, and told a number of people that he caught appellant in this act. Appellant then arms himself, goes to the home of deceased, and demands that he take back the charges he made. Deceased declines to do so, when he is shot twice, both balls entering the back. Under such a state of facts, if the jury believed the State's evidence, the verdict is merciful, for it would have supported murder in the first degree.

The judgment is affirmed.

Affirmed.

JOSHUA ROGERS v. STATE.

No. 2271. Decided February 12, 1913.

Theft—Venue—Statutes Construed.

Under Article 245, Revised Code Criminal Procedure, where property is stolen in one county and carried off by the offender to another, he may be prosecuted either in the county where he took the property or in any other county through or into which he may have carried the same. Following Pearce v. State, 50 Texas Crim. Rep., 507, and other cases.

Appeal from the District Court of Terrell. Tried below before the Hon. W. C. Douglas.

Appeal from a conviction of theft of property of value over $50; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

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DAVIDSON, PRESIDING JUDGE.—This is a conviction for theft of property over the value of $50, the punishment being assessed at two years confinement in the penitentiary.

The question of venue seems to be the main proposition relied upon. The facts show that the money was taken from the alleged owner, Ruiz, in either El Paso County or in the county of Jeff Davis. The property was alleged to have been taken by the train porter from Ruiz, who was a traveler. Ruiz walked into the water closet and hung his coat upon the door knob on the inside. In handling the water-works in the closet in some way he failed to manipulate it correctly and called the porter. He walked out, forgetting his coat, but finally went back in a few minutes and the location of the coat had been changed and his pocket-book had been taken which contained $260 in Mexican money, worth something like forty-eight cents on the dollars in American money. There is some evidence going to show at one station further down the road the person of appellant was examined but the money not found. After reaching the end of the division, Sanderson in Terrell County, the officer at that point, made another examination and found the money in a bag, or connected with a bag which contained some pillows which appellant, as train porter, used for the accommodation of passengers on the trains. It was evidently the same money the traveler had lost, consisting of two one hundred dollar bills and three twenty dollar bills in Mexican money. The proposition that appellant asserts is that the venue was not in Terrell County, but at the point where the money was taken,—El Paso, Jeff Davis, or some other point before reaching Terrell County. There is no merit in this contention. The statute, Article 245, Revised Code Criminal Procedure, provides, "that where property is stolen in one county and carried off by the offender to another, he may be prosecuted either in the county where he took the property or in any other county through or into which he may have carried the same." It has been held that this statute applies to thefts other than those committed from the person. See Clark v. State, 23 Texas Crim. App., 612 and cases there cited; Pearce v. State, 50 Texas Crim. Rep., 507.

We are of opinion that the evidence is sufficient and the venue is properly laid in Terrell County.

The judgment is affirmed.

Affirmed.

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DILMOUS DAVIS v. STATE.

No. 2275. Decided February 12, 1913.

Rehearing denied March 12, 1913.

1.—Assault to Rape—Sufficiency of the Evidence—Alibi.

Where, upon trial of assault with intent to rape, the evidence sustained the conviction and the court submitted the defendant's alibi, the conviction was sustained.

2.—Same—Continuance—Counsel—Attorney and Client.

Where the motion for continuance was oral and alleged that defendant's attorney was temporarily absent, there was no error in the court's action in overruling same. Following Usher v. State, 47 Texas Crim. Rep., 93.

3.—Same—Continuance—Want of Diligence.

Where the application for continuance did not show what defendant expected to prove by the absent witnesses and did not show any diligence, the same was correctly overruled.

4.—Same—Evidence—Bills of Exception—Motion for New Trial.

In the absence of bills of exception to the introduction of testimony, complaints in the motion for new trial on this ground and a bill of exceptions to the overruling of the motion does not raise the question in such way as to be reviewed.

5.—Same—Charge of Court—Limiting Testimony.

Where no necessity is shown and no error is assigned in the court's failure to limit testimony, there is no error.

6.—Same—Charge of Court—Accomplice.

Even if the testimony did not require the submission of the issue of accomplice, it is not shown in the record on appeal how a charge on accomplice testimony was prejudicial to the defendant.

Appeal from the Criminal District Court of Dallas. Tried below before the Hon. Robt. B. Seay.

Appeal from a conviction of assault to rape; penalty, ten years imprisonment in the penitentiary.

The State's testimony showed that while prosecutrix was returning to her home by herself late in the evening, the defendant made an assault upon her and attempted by force to have sexual intercourse with her, and that she resisted and finally escaped from him.

Harmon & Baker, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—From a conviction of an assault with intent to rape, with a penalty fixed at ten years in the penitentiary, the appellant appeals.

The evidence is clearly sufficient to justify the verdict. Appellant's defense was alibi, which was correctly submitted by the court and found against him.

By one bill it is shown that appellant made an oral motion for a continuance. It is set out in the record. It is on two grounds: First, because his attorney was temporarrily out of the State, or

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city, and made no arrangement for the case, believing that he would return in time to try it. Neither the bill nor the motion for continuance show any such ground as would justify the court to reverse this case on that account. Usher v. State, 47 Texas Crim. Rep., 93.

The other ground of the motion for continuance is on account of the absence of three witnesses. Neither the bill, nor the motion in any way show what was expected to be proved by these witnesses, their residences or that any diligence whatever had been used to get them. The court did not err in overruling the motion for continuance.

The record does not show that any exception whatever was taken to the introduction of any testimony during the trial. In the motion for new trial several complaints are made to the introduction of testimony. The appellant merely has bills of exceptions to the overruling of his motion for new trial on these several grounds. This does not raise the question in such a way as that we can pass upon it. Objections to testimony must be made at the time it is offered and bills then taken. If not, it is too late to complain, for the first time, in the motion for new trial.

In the motion for new trial appellant complains that the court erred by failing to limit the testimony of Dee Taylor as affecting the credibility of the witness, Sam Davis. No necessity is shown for this, either in the motion or elsewhere.

In like manner appellant complains that the court submitted to the jury to find whether one of the State's witnesses, Dan Taylor, was an accomplice. The charge is not excepted to other than that no charge on the subject was called for. Even if the testimony did not require the submission of this question to the jury, it is not shown and we can not see how such a charge was prejudicial to appellant.

We have carefully considered all of appellant's complaints and in the way they are raised, none of them present any reversible error. The judgment is, therefore, affirmed.

Affirmed.

[Rehearing denied March 12, 1913.—Reporter.]

BRICE ROBINSON V. STATE.

No. 2276. Decided February 12, 1913.

1.—Assault to Murder—Evidence—Husband and Wife—Cross-examination.

Where the objections to the cross-examination of defendant's wife did not point out any error, the conviction was sustained.

2.—Same—Sufficiency of the Evidence.

Where, upon trial of assault with intent to murder and a conviction of aggravated assault, the evidence was sufficient to sustain the conviction, there was no error.

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Appeal from the Criminal District Court of Dallas. Tried below before the Hon. Robt. B. Seay.

Appeal from a conviction of aggravated assault; penalty, a fine of $100 and six months confinement in the county jail.

The testimony for the State shows that the assaulted party and defendant had some previous altercation, and that some time thereafter on the same day in the night-time, the parties again met and after some words, defendant shot the party injured, and that the latter stayed in the hosptial for some months on account of the wound inflicted; that the party injured did not do anything at the time he was shot.

The defendant, however, testified that he acted in self-defense in repelling an assault by deceased upon him.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—Appellant was convicted of an aggravated assault, fined $100 and imprisoned six months in the county jail.

There is but one bill of exceptions. It is quite lengthy. It recites all of the testimony of the wife of the appellant, who was introduced by him, on her direct examination, containing several pages of typewriting. Then it gives her testimony on cross-examination. All this is first stated in a narrative form. Then all this is again given by questions and answers for both the direct and cross-examination. Altogether it contains fifteen pages of typewritten matter. The court, in approving the bill, states as follows:

"This bill is approved to this extent. The court never overruled an objection going into new matters in cross-examination of the wife. On the contrary the court at one time at the beginning of the cross-examination instructed the *county attorney* not to go into any new matter. As will be seen by the stenographer's notes in this bill only two objections were made by the defendant. One was when State's attorney asked the given name of defendant's father. The other was to the question (Last in the notes), 'When did you see him at ten o'clock that night.' To this defendant objected and the court sustained the objection." As qualified by the court it presents no error. Even without this qualification no error is shown.

Complaint is made in the motion for new trial that the verdict is contrary to the great preponderance of the evidence. We have carefully gone over the evidence. It in every way amply sustains the verdict. In fact it would clearly have justified a conviction of an assault with intent to kill, for which appellant was indicted.

No other ground by appellant shows any error whatever. The judgment is affirmed.

Affirmed.

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JIM HORTON V. STATE.

No. 2327. Decided February 12, 1913.

Rehearing denied March 12, 1913.

1.—Theft—Continuance—Want of Diligence.

Where defendant's application for continuance showed a total want of diligence, there was no error in overruling same.

2.—Affidavit—Motion for New Trial—Attorney and Client.

Affidavits attached to the motion for new trial which were taken and sworn to by appellant's counsel as notary public cannot be considered on appeal. Following Maples v. State, 60 Texas Crim. Rep., 169.

Appeal from the County Court of Dallas County at Law. Tried below before the Hon. W. F. Whitehurst.

Appeal from a conviction of misdemeanor theft; penalty, thirty days imprisonment in the county jail.

The opinion states the case.

J. S. Baker, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was convicted of a misdemeanor theft.

A motion was made for new trial upon the grounds that appellant had been deprived of his witnesses. There was no application for continuance. Appellant asserts in his motion for a new trial that he informed his attorney who these witnesses were and asked him to see that they were summoned. The witnesses were not summoned and no process, so far as the record is concerned, was asked for. He went to trial and the same attorney, it seems, defended him during the trial without making an application for continuance or any request that the case be postponed till the witnesses could be secured. On motion for new trial he had retained another attorney who was not engaged in the trial. This attorney obtained some affidavits which are attached to the motion for new trial, stating what the witnesses would testify. The testimony would have been of some materiality had these witnesses been before the jury. We are of opinion, however, that the diligence in the matter was utterly wanting. While the attorney who defended him on trial did not apply for a continuance and did not call the court's attention to the absent witnesses or give any reason why he went to trial without the witnesses, the appellant and counsel who defended him all knew of the facts stated in the affidavit before the announcement of ready for trial. No authority is cited to us that would support his contention that under the circumstances he was entitled to a new trial. Another proposition, however, eliminates the affidavits attached to the motion for new trial. In Maples v. State, 60 Texas Crim. Rep., 169, the

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question here presented was expressly decided. In this case the attorney who represented appellant in the motion for new trial took the affidavits attached to the motion for new trial and swore the witnesses before himself as Notary Public. He was then the attorney in the case and had filed a motion for new trial,—before taking the affidavits as shown by the record. The motion for new trial was filed on November 18th. An amended motion was filed subsequently. Appellant swore to the motion for new trial, prepared by counsel, on the 18th of November, which motion was sworn to before his attorney as Notary Public. The affidavits, one was filed on the 19th of November, another on the 20th of November, another on the 20th of November and another was filed on November 21st, which shows to have been sworn to on the 7th of December, sometime after the time of its filing, but they are all sworn to before the attorney as Notary Public. These affidavits can not be considered. In the Maples case, supra, there were affidavits used and the language of the opinion is as follows:

"Mr. Lipscomb, private prosecutor in the case, took the affidavits of the jurors and appended same to the State's contest of the motion for new trial. Motion was made by appellant to strike out these affidavits as they were unwarranted and could not be taken by counsel in the case. We are of opinion this proposition is well taken. The county attorney could not swear the jurors to such an affidavit, nor can interested counsel do so. See Testard v. Butler, 20 Texas Civ. App., 106; Rice v. Ward, 93 Texas, 532, 56 S. W. Rep., 747; Blum v. Jones, 86 S. W. Rep., 492; Floyd v. Rice, 28 Texas, 341; Rice v. Ward, 93 Texas, 532. See also 13 Cyc., 852 for collation of authorities."

These affidavits will not, therefore, be considered from either standpoint. This motion for new trial was properly overruled by the trial court.

The judgment is affirmed.

Affirmed.

[Rehearing denied March 12, 1913.—Reporter.]

EDMUND ROGERS V. STATE.

No. 2232. Decided February 12, 1913.

1.—Assault to Rape—Indictment—Words and Phrases.

Where the word, "teo," was in fact, "ten," with reference to the date alleged in the indictment, when taken in connection with the entire sentence employed, there was no error in overruling a motion to quash on that account. Following Lewis v. State, 55 Texas Crim. Rep., 167, and other cases.

2.—Same—Sufficiency of the Evidence.

Where, upon trial of assault with intent to rape, the State's testimony sustained the verdict, there was no error, although there was a conflict of testimony; this is a question of fact for the jury.

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Appeal from the District Court of Washington. Tried below before the Hon. Ed. R. Sinks.

Appeal from a conviction of assault with intent to rape; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Buchanan & Stone, for appellant.—On question of insufficient testimony: Montresser v. State, 19 Texas Crim. App., 281; Gazley v. State, 17 id, 267 Dusek v. State, 48 Texas Crim. Rep., 519; Draper v. State, 57 S. W. Rep., 655; Alcorn v. State, 94 S. W. Rep., 468; Perez v. State, 50 Tex. Crim. Rep., 34, 94 S. W. Rep., 1036.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was convicted in this case of an assault to rape the person of Delila Lockett, a girl under fifteen years of age, and his punishment assessed at two years confinement in the State penitentiary.

Appellant filed a motion to quash the indictment on the following ground: "Because the said indictment does not contain any date that the alleged rape was committed, it only providing as follows, to-wit: 'That Edmund Rogers on or about the 6th day of February one thousand nine hundred and teo.'" The court approved the bill reserved to this action in overruling the motion with the following qualification: "The original indictment has been ordered sent up with the record for the inspection of the court, it being my opinion that what was claimed in the motion to be 'teo' was ten." We have carefully inspected the original indictment and are of the opinion that the court was fully authorized to hold that the word in the indictment was "ten" and not "teo." (Morris v. State, 43 Texas, 372; Witten v. State, 4 Texas Crim. App., 70; Hutto v. State, 7 Texas Crim. App., 44; Hennessey v. State, 23 Texas Crim. App., 340; Lewis v. State, 55 Texas Crim. Rep., 167.) Appellant could not have been misled to his prejudice, and as the word can be read as well "ten" as any other way, and when taken in connection with the entire sentence shows plainly how it should be so read.

The only other ground in the motion for new trial complains of the insufficiency of the testimony to sustain the conviction. The jury, twelve good and lawful men of Washington County, who tried appellant, deemed it sufficient; the trial judge who considered the evidence on motion for new trial thought it ample, and we are asked simply because of a conflict in the testimony of the prosecuting witness, and the fact, as contended by appellant, that it comes from a questionable source, to wholly disregard it. The contention is mainly, that this witness for the State is unworthy of belief; that the circumstances show her testimony to be fabricated at the instance of another. Doubtless all these contentions were argued and presented

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to the jury by the able counsel representing appellant. If it should be admitted that from reading the record a reasonable doubt was raised in our mind, we are not authorized to substitute our judgment for that of the jury. It is not a question of what would have been our verdict had we been members of the jury who tried appellant, but the question for us to decide, if the jury believed the testimony offered in behalf of the State, does it sustain the verdict, and, if so, then the verdict must stand. There is no such conflict in the testimony of the prosecuting witness as to render it wholly inconsistent with human wisdom and experience. In her direct testimony she tells of how the offense occurred in a way that is consistent with the way such offenses are committed on children, and while the record discloses that a splendid defense was made, and the jury would perhaps have been justified in returning a verdict of not guilty, yet they did not do so, and under such circumstances we feel impelled to respect their verdict.

The judgment is affirmed.

Affirmed.

C. B. SPENCER v. STATE.

No. 2079. Decided February 12, 1913.

1.—Murder—Sufficiency of the Evidence.

Where, upon trial of murder and a conviction of manslaughter, the evidence sustained the conviction, there was no error.

2.—Same—Newly Discovered Evidence—Cumulative Evidence.

While it is public policy to forbid new trials for the purpose of admitting cumulative testimony, yet, where newly discovered testimony is of such cogency and force that it may properly show that an innocent man has been convicted, a new trial should be granted.

3.—Same—Case Stated—New Trial Should be Granted, When.

Where defendant was convicted of manslaughter, and the brother of the defendant testified during the trial that he and not his brother fired the shot at the deceased, and after conviction, it was shown by affidavit of a disinterested witness that this testimony was true, but had been wilfully withheld from the knowledge of the defendant and his counsel until after trial, a new trial should have been granted, although such newly discovered evidence was mainly cumulative.

4.—Same—Charge of Court—Independent Impulse.

Where there was no evidence that defendant and his brother were acting together at the time of the homicide, upon a previous understanding, and there was evidence that defendant's brother killed deceased, the court's charge should not have required that he must have acted upon an independent impulse.

Appeal from the District Court of Falls. Tried below before the Hon. Richard I. Munroe.

Appeal from a conviction of manslaughter; penalty, three years imprisonment in the penitentiary.

The opinion states the case.

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Williams & Williams and *Nat Llewellyn,* for appellant.—On question of newly discovered evidence: Gray v. State, 144 S. W. Rep., 283; Fisher v. State, 30 Texas Crim. App., 502; Riojas v. State, 36 Texas Crim. Rep., 182; Weaver v. State, 52 Texas Crim. Rep., 11; Clark v. State, 51 id, 519; French v. State, 47 id, 571; Brock v. State, 44 id, 335; Moore v. Forsythe, 49 Texas, 171.

C. E. Lane, Assistant Attorney-General, and *Frank Oltorf,* for the State.—On question of newly discovered evidence: Templeton v. State, 5 Texas Crim. App., 398; Burns v. State, 12 id, 369; Pelly v. Ry. Co., 78 S. W. Rep., 542.

HARPER, JUDGE.—Appellant when tried was convicted of manslaughter, and his punishment assessed at three years confinement in the penitentiary.

The State's evidence would support the verdict, and we do not deem it necessary to state it in detail, but only such of it as will explain the opinion of the court.

On the trial it was proven that deceased and appellant had been friends, but on the morning of the difficulty deceased went into the store of appellant to transact some business. That a dispute arose and deceased called appellant a son-of-a-bitch. It is not clear which one committed the first overt act in the actual difficulty that occurred, but it is apparent that they "clinched," and a scuffle ensued. A State's witness says that during the difficulty appellant pulled a pistol and shot deceased, and there are circumstances in the case which support this theory.

Appellant testified, admitting the difficulty, but says he had no pistol and did not do the shooting, and did not know who did do it. That deceased had an arm around his neck, and he was so situated he could not and did not see the shooting. That when the pistol fired deceased fell and dragged him down with him.

John Spencer, a brother of appellant, who was a clerk in the store, tells of the difficulty, and says that deceased had his brother (appellant) around the neck with his left arm, and run his right hand in his pocket, saying at the time, "I will cut your God damn guts out," and he (John Spencer) then fired the shot that killed the deceased. If John Spencer in fact shot the deceased, there is no evidence that appellant, C. B. Spencer, had any knowledge of such intention on John Spencer's part.

The jury find that C. B. Spencer, appellant, fired the shot, and not John Spencer, and, as we said before, the evidence had on the trial would support their so finding. The amended motion for a new trial together with the affidavits attached and evidence heard on the motion for new trial, shows that after the trial the foreman of the jury met a friend who informed him that they had convicted the wrong man, and in the conversation disclosed his reasons for so be-

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lieving, stating his source of information. The foreman of the jury went promptly to appellant's counsel and told him what he had heard. Upon investigation it was discovered that there was a man who claimed he had seen the difficulty, and who would testify that John Spencer and not appellant was the person who fired the shot. This witness left Marlin shortly after the difficulty and is now residing in Missouri. Appellant's counsel went to Missouri and saw this witness, Mr. Floyd P. Smith, and attaches the affidavit of Mr. Smith, which reads as follows.

"In the spring of 1908 I went to Marlin, Texas, to live for my health and remained there until July, 1909. During all of that time I was in the employ of Curtis & Co. at their store in Marlin. I was working there at the time a man named Thomas was shot and killed in the store of C. B. Spencer just across the street from the store I worked in. I saw John Spencer shoot Mr. Thomas. C. B. Spencer did not shoot Mr. Thomas. There was only one shot fired and I saw John Spencer fire that. The circumstances were as follows so far as I saw: It was about the noon hour and I had started out the north front door of Curtis & Co. to go get a sack of tobacco and just as I got on the side walk (being on Commerce street) I heard a scuffling in the front part of Spencer's store across the street. I looked over there and saw Mr. Thomas scuffling with some one. This party Mr. Thomas was scuffling with was backing before Mr. Thomas caught hold of him, and just as Mr. Thomas caught him he backed behind the edge of the door facing from me so that I could only see Mr. Thomas and could not see the person he had hold of, as they backed against the wall I heard a trace chain fall or something that sounded like it, and just at this time while these two men were scuffling there by the door facing I saw John Spencer come up the south isle of the Spencer store and shoot Mr. Thomas in the side or back with a pistol, and just then I saw C. B. Spencer come out from behind the door facing so that I then knew and now state as a fact that it was C. B. Spencer that Mr. Thomas was scuffling with. Mr. C. B. Spencer came instantly into my view after the shot was fired and he did not then have any pistol in either hand, nor did I see him with one at any time. John Spencer was standing directly in front of the door and about four or five feet back from it at the corner of the show case by the south isle when he shot Mr. Thomas. When the shot was fired Thomas dropped to his knees or entirely to the floor—he fell. But I cannot definitely say whether it was just to his knees, his all-fours or entirely down, as I turned abruptly and went immediately back in the Curtis & Co. store. As I went in I met Gilbert O. Burgess coming to the front door and he turned and went back with me. We then looked through the glass door and I saw Mr. Thomas, he was then standing up again and seemed to be leaning on C. B. Spencer or Mr. C. B. Spencer was trying to hold him up, but he gradually sank to the floor. I knew both of the Spencers well by sight

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and came in daily contact with them. I cannot be mistaken when I say it was John Spencer and not C. B. Spencer that shot Mr. Thomas. John Spencer was standing in front of the door back only a few feet from it and in plain view of me when he fired the shot, he was about seventy feet from me. I have never told anyone what I saw or knew about this matter except Mr. Gilbert Burgess and Mr. D. W. Stallworth of Marlin, nor have I told or intimated to anyone else that I knew anything at all about the killing of Mr. Thomas. I have never told Mr. C. B. Spencer or any of his attorneys or family or anyone else about my knowing anything of this matter and he had no reason for suspecting that I knew of it that I know or can think of.

"My reason for not wanting anyone to know that I knew the facts I have stated above and on the opposite side of this sheet of paper is—the condition of my health at that time—I had gone to Texas and to Marlin for lung trouble and my doctor, Doctor Allen of Marlin had told me that I had a cavity in each lung and had advised me against any excitement whatever and I very much feared any excitement whatever; what did happen and my seeing it put me to bed for several hours. I regarded my condition there at that time as serious. Later I went to Dr. Torbett of Marlin and in July of that year he advised me to go to San Marcos, Texas, on account of my lung trouble. I left Marlin in July, 1909, and have never been back since. I went from there to San Marcos, Texas, where I remained eleven months and then came direct to my old home at Laddonia, Missouri, where I now live. My health is now much improved and I believe I have almost if not entirely recovered from my lung trouble, but otherwise my health is not very good at this particular time. If this case is ever tried again in the trial court it is my intention to be present and give my testimony in this case and I would have given both sides the benefit of what I know before this, but for the reasons above stated. I am thirty-three years old, have been married fourteen years and have three children. I have no special interest in this matter and only a speaking acquaintance with C. B. Spencer. I have never been convicted of or charged with a felony or any other offense, and no fact exists that would render me incompetent as a witness. I am well known by the business people of Marlin, Texas. I am a member of the Christian church. I have never seen anyone from Marlin since I left there except Mr. Gilbert Burgess. As I recollect it this shooting occurred in February, 1909.

"Signed and sworn to this June 19th, 1912.

"Floyd P. Smith.

"Signed and sworn to before me by Floyd P. Smith, who is personally known to me, this June 19th, 1912.

"(Seal) W. H. Logan,

"Notary Public Audrain County, Missouri.

"My commission expires June 24, 1914."

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By the testimony of a number of witnesses Mr. Smith is shown to be a credible man whose general reputation is good for truth and veracity.

Appellant testifies as to the diligence used to discover all persons who knew anything about the difficulty, at the time and before the trial of his case, and we think it such that any ordinary person would use, and he cannot be held not to have used proper diligence in discovering sooner that Mr. Smith was a witness in his case.

However, the State contends that even if appellant is not lacking in diligence, the testimony is but cumulative of that of John Spencer; and for this reason the court did not err in refusing to grant a new trial. This is the general rule of law as has frequently been announced by this court. The appellant contends that it is not "cumulative only," and enters into a lengthy discussion of what is "only cumulative testimony." The distinction he attempts, and the decisions he cites we do not deem it necessary to notice under the disposition we make of this case.

There can be no question under the evidence in this case, that if John Spencer in fact fired the shot appellant is not guilty of the homicide either as a principal, accomplice or accessory. In other words, if the shot was fired by John Spencer, an innocent man has been sentenced to the penitentiary. The evidence, without the testimony of Floyd P. Smith, renders it extremely doubtful as to which one, appellant or John Spencer, did the shooting, and while the testimony would justify the jury in finding as they did on this contested issue, it would also have supported a finding that John Spencer did the shooting. The record being in this condition, can any man say what would have been their finding if Mr. Smith, a reputable citizen, had supported the testimony of John Spencer by testifying that he saw John Spencer fire the shot? We all know how prone human nature, men who compose the juries of the country as well as the balance of mankind, is to fail to give to the evidence of a brother of one on trial charged with a penitentiary offense that credence that would be given to his testimony under different circumstances. The testimony of a relative, of one on trial, is seldom given that weight that is given to one wholly disinterested, even though they may be men of equal standing and reputation in the community. We all feel and believe that the ties of blood, of brotherhood, will have its weight with a witness, and the law recognizes this by admitting evidence of that fact to show interest, bias, etc. As said in some of the opinions, the reason for the rule forbidding a new trial for the purpose of admitting cumulative testimony is that public policy, looking to the finality of trials, requires that a defendant be held to diligence in preparing their cases for trial, but this policy which seeks to limit continued litigation should never be applied where the newly discovered testimony may be of that cogency and force where it might probably show that an innocent man may probably be caused to

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suffer for a crime he did not commit. Courts are organized, and the object of the law is that the true facts may be arrived at and justice administered, and where the evidence is about upon an equipoise as to whether a man committed an offense or not, if there is really newly discovered testimony coming from a credible source, this rule will be held in subordination to the great end to be obtained—that is, meting out justice to each individual citizen. As illustrative of this rule, two men may be charged with crime, and under such circumstances neither can be a witness for the other, but if one is first tried and convicted, and then the other tried and acquitted, our courts have always held that a new trial will be granted if in a motion for a new trial he swears that the testimony of this witness is material to his defense, and the witness attaches his affidavit swearing to facts that are material to the defense, even though it should be held to be in some sense cumulative. The reason being that, no amount of diligence could sooner have obtained this testimony. And in this case it is disclosed that the witness wilfully withheld from the knowledge of this defendant the facts he would testify to until discovered by accident by the foreman of the jury who had convicted him. While the testimony of Mr. Smith, as shown by the affidavit, may be said to be cumulative of the testimony of John Spencer, yet in it are stated some other facts and circumstances not testified to by John Spencer, but corroborative of the theory of the appellant in this case—that he was attacked by deceased and retreated. Looking at the relative size and strength of the parties as shown by the record, Thomas, deceased, being a powerful man, weighing from 190 to 200 pounds, much heavier and stronger than appellant, as the court submitted the issue of self-defense as to appellant, this testimony might have great weight. Viewing the record as a whole, we do not think this alleged newly discovered testimony can be said to be only cumulative in the legal sense of those words, but if it should be so held, then this case presents one of those rare instances where the evidence adduced on the trial renders it questionable as to whether appellant is guilty of any wrongdoing, and while we would not feel authorized to disturb the verdict on account of this conflict in the testimony, yet a new trial should be granted to enable appellant to place before a jury of his countrymen this additional testimony, coming, as it does, from a credible source, before being branded as a felon. While the interests of society require that those who violate the law shall be punished and restrained, yet the State desires no innocent man to suffer, and a greater crime is committed against society when a person, guilty of no offense, is wrongfully made to wear prison stripes, than when one guilty is permitted to escape. Our law is that so long as there is a reasonable doubt of one's guilt, he is entitled to that doubt, and this evidence of Mr. Smith can but create a doubt in the mind of one that if it had been before the jury in this case, a different result might have been obtained.

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There are other questions presented in the record, but we deem it unnecessary to discuss them, except to add that as there was no evidence that appellant and John Spencer were acting together, carrying out a common purpose in accordance with a previous understanding, the court should not have burdened that part of his charge presenting the theory as to whether or not John Spencer killed deceased, with the requirement that the jury must find that "he acted upon an independent impulse of his own." On another trial, if the evidence is the same, those words should be omitted from that paragraph of the charge. While under the evidence this perhaps would not present reversible error, but on account of the matters above pointed out, the judgment is reversed and the cause is remanded.

Reversed and remanded.

DOUGLAS BUSSEY V. STATE.

No. 2270. Decided February 12, 1913.

1.—Assault to Murder—Charge of Court—Threats.

Where, upon trial of assault to murder, the court's charge on threats required the jury to believe that the threats were in fact made, the same was reversible error. Following Buckner v. State, 55 Texas Crim. Rep., 517.

2.—Same—Charge of Court—Self-defense—Threats.

Where, upon trial of assault to murder, the evidence clearly raised self-defense in connection with threats, but did not raise self-defense otherwise, so as to require an additional charge on that subject, a failure to so charge was not reversible error.

3.—Same—Aggravated Assault—Deadly Weapon—Serious Injury.

Where, upon trial of assault with intent to murder, the court charged on the issue of aggravated assault, there was no error in the court's failure to submit subdivision 7 and 8 of Article 1022, Penal Code, the evidence showing that the defendant was within shooting distance of the party injured when he fired with a shotgun.

Appeal from the District Court of Shelby. Tried below before the Hon. W. C. Buford.

Appeal from a conviction of assault with intent to murder; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Carter & Walker and *S. Chamness* and *J. P. Anderson,* for appellant.—On question of the court's charge on threats: Huddleston v. State, 54 Tex. Crim. Rep., 93, 112 S. W. Rep., 64; Mitchell v. State, 50 Tex. Crim. Rep., 180, 96 S. W. Rep., 43, and cases cited in opinion.

On question of court's charge on aggravated assault: Hightower v. State, 56 Tex. Crim. Rep., 248, 119 S. W. Rep., 691; Henderson v. State, 55 Tex. Crim. Rep., 15, 115 S. W. Rep., 845.

C. E. Lane, Assistant Attorney-General, for the State.

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PRENDERGAST, JUDGE.—Appellant has appealed from a conviction of an assault with intent to kill.

Only a brief statement of the evidence is necessary to properly pass upon the question raised. The evidence establishes that on the night preceding the shooting of the complaining witness by appellant that they had a fuss or row at the church and that appellant and his kinsman, Coleman Bussey, had assaulted Alonzo Curtis and run him away from the church; that thereupon said Curtis, the assaulted party, went off, procured and returned with his gun and, it seems, sought, that same night, an opportunity to have a further difficulty with appellant and Coleman Bussey, but no further altercation occurred between them that night. Two witnesses, Anna Mays and Ben Strange, each testified that they saw Curtis the next day and he made threats against the said Busseys of what he would do to them the next night. Both of these witnesses testified that on the same day and before the shooting that night that each communicated these threats to appellant. Appellant testified that they both communicated said threats to him. Curtis, the assaulted party, denied making any such threats to either of these witnesses.

The court properly charged on threats but required the jury to believe that the threats were made. Appellant complains and properly raised and preserved the question that the charge should also have submitted to the jury that whether the threats had been made or not, if appellant believed they had been made, and so believing, acted upon them, then the law would justify him in so acting. In our opinion appellant's contention is correct and the charge should have so submitted. Buckner v. State, 55 Texas Crim. Rep., 517-518, and cases there cited; Lundy v. State, 59 Texas Crim. Rep., 135, and cases cited. See also Branch's Crim. Law, Sec. 482, p. 311. It is needless to cite the many other cases to the same effect.

Again, the court charged on self-defense in connection with and based upon threats. Appellant complains that in addition to this, the court should have charged on self-defense independent of and in addition to so charging in connection with threats.

This court has repeatedly held that where the evidence calls for it, in addition to charging on self-defense in connection with threats, that an independent and an additioal charge should also be given on self-defense. But where the evidence does not raise the question, then no general charge on self-defense, in addition to that given in connection with threats, is necessary. In this case the evidence clearly raises self-defese in connection with threats, but in our opinion it does not raise self-defense otherwise so as to require an additional charge on that subject. If on another trial self-defense, independent of and disconnected from threats, is raised, of course, it will be proper for the court to charge thereon.

Appellant also contends that the court should have charged on aggravated assault, based on subdivisions 7 and 8 of Article 1022, Penal

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Code. The court did charge on aggravated assault on the theory that the evidence raised the question of whether or not appellant's mind was incapable of cool reflection, caused by what had occurred between the parties theretofore and at the time of the shooting. In our opinion the evidence only raised the question of aggravated assault on the theory in which the court charged it, and the evidence did not authorize or require such a charge on either of the grounds claimed by appellant. Hatton v. State, 31 Texas Crim. Rep., 586; Yzaguirre v. State, 48 Texas Crim. Rep., 514, Sec. 521, Branch's Crim. Law. The evidence in this case shows that appellant shot the deceased with a double-barrel-shotgun and the distance between them at farthest was only twenty-five or thirty steps.

Because of the error in the charge of the court above pointed out, the judgment is reversed and the cause remanded.

Reversed and remanded.

HERMAN BOSLEY V. STATE.

No. 2198. Decided February 12, 1913.

1.—Murder—Continuance—Second Application—Want of Diligence.

Where the application for continuance was the second in number and did not state that the testimony could not be procured from any other source, but showed on its face that it could be so procured and, besides, there was a want of diligence in not applying for process after the witness moved out of the county of the prosecution, there was no error in overruling a motion for continuance.

2.—Same—Continuance—Other Testimony.

Where another witness testified to the same facts that were expected to be proved by the absent witness, there was no error in overruling the motion. Following Harvey v. State, 35 Texas Crim. Rep., 545.

3.—Same—Continuance—Want of Diligence—Depositions.

Where defendant's motion for continuance showed a want of diligence in applying for process or taking the depositions of the absent witness while out of the State, and besides, the testimony of the absent witness was admitted in evidence by another witness and the only disputed fact was not probably true, there was no error in overruling the motion. Following Wilkins v. State, 35 Texas Crim. Rep., 525, and other cases.

4.—Same—Evidence—Contradicting Witness—Regular Order.

Where evidence is introduced to impeach the witness by proof of contradictory statements made to him by others, evidence is competent to show that he had previously made statements agreeing with and corroborating his testimony on trial, even if such evidence is not introduced in regular order. Following Hamilton v. State, 36 Texas Crim. Rep., 372, and other cases.

5.—Same—Evidence—Self-Serving Declarations—Allusion to Defendant's Failure to Testify.

Upon trial of murder, there was no error in excluding the self-serving declarations made by the defendant to his witness after his arrest, and there was no reversible error in the State's counsel's remark that if they wanted to prove that fact, to place defendant on the stand; the same occurring during trial, and was but an incidental remark of State's counsel, and not such an allusion to defendant's failure to testify as to be cause for reversal. Following Combs v. State, 55 Texas Crim. Rep., 332, and other cases.

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6.—Same—Charge of Court—Circumstantial Evidence—Alibi.

Where, upon trial of murder, the case being one of circumstantial evidence, and defendant claimed an alibi, the court properly submitted these issues in a proper charge; no exact words being necessary in charging on circumstantial evidence, and the failure to use the words, "and none other," was not material. Following Henderson v. State, 50 Texas Crim. Rep., 266.

7.—Same—Defendant as a Witness—Charge of Court.

The court's failure to charge the jury that the defendant could testify in his own case, but a failure to do so should not be considered against him or alluded to or discussed by the jury; there being no contention that the jury did allude thereto, was not reversible error. Following Morrison v. State, 40 Texas Crim. Rep., 473.

8.—Same—Sufficiency of the Evidence.

Where, upon trial of murder in the second degree and conviction thereof, the evidence sustained the conviction, there was no error.

9.—Same—Affidavits—Matters Occurring After Trial—Practice on Appeal.

This court cannot consider affidavits concerning matters occurring since the trial, and can only look to the record made on the trial of the case from which the appeal is prosecuted; besides, the question of former jeopardy set up in these affidavits could not apply.

Appeal from the District Court of Shelby. Tried below before the Hon. W. C. Buford.

Appeal from a conviction of murder in the second degree; penalty. five years imprisonment in the penitentiary.

The opinion states the case.

Carter & Walker and *Davis & Davis,* for appellant.

C. E. Lane, Assistant Attorney-General, for the State.—On question of contradicting witness and right to anticipate testimony: Gibson v. State, 23 Texas Crim. App., 414; Reddick v. State, 35 Texas Crim. Rep., 463; Campbell v. State, 35 id, 160; Duke v. State, 35 id, 283, and cases cited in opinion.

On question of defendant as a witness and court's charge thereon: Guinn v. State, 39 Texas Crim. Rep., 257.

HARPER, JUDGE.—Appellant was indicted, charged with murder in the second degree, and when tried was convicted of that offense, and his punishment assessed at five years confinement in the State penitentiary.

Appellant filed an application for a continuance on account of the absence of Allee Earl, Mell Handy, and Idella Waterhouse. This was his second application, a continuance at the former term having been granted on his application. By the witness, Allee Earl, he states he can prove that some four or five days after appellant was arrested. charged with this offense, one Rufus Driver at night came to the home of appellant and "asked the wife of appellant not to turn against him, Rufus Driver; that he was also charged with the offense (as well as appellant) and there would be no case against him (Driver) if she (appellant's wife) did not turn against him. and

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promised to buy her a nice present." As to this witness, the record discloses that she was summoned while a resident of Shelby County; that since being summoned she had moved to Nacogdoches County, and no additional process had been issued for her, consequently the diligence as to this witness would be insufficient on a second application. The witness was not required to attend, having moved out of the county, and the application, to be sufficient, must show that a subpoena had been issued to the county where the witness had moved, or some good reason stated why it had not been done. This has always been the rule in this court. In addition to this, the application itself shows that the testimony was procurable from another source, and no reason stated why this witness was not used, and it has been the unvarying rule in this court that a second application is insufficient which fails to show that the testimony cannot be procured from any other source. McCullough v. State, 35 Texas Crim. Rep., 268; Pinckford v. State, 13 Texas Crim. App., 468; Henderson v. State, 5 Texas Crim. App., 134. Then again, it would only be by inference that the testimony desired from this witness could be of any benefit to defendant. This language would be as susceptible of the construction that Driver thought himself wrongfully accused by appellant and his mother, and he did not want his wife to join in the wrongful accusation as one injurious to Driver.

As to the witness, Mell Handy, the record shows that another witness did appear and testify to the same facts it was expected to be proven by this witness, and in Harvey v. State, 35 Texas Crim. Rep., 154, and other cases, it has been held that testimony which would only be cumulative of other testimony adduced on the trial would be no ground on which to base a second application for a continuance.

The only other witness named in the application is Idella Waterhouse, the mother of this appellant. The application and record would disclose that almost immediately following the homicide appellant and his mother, the absent Idella Waterhouse, were arrested charged with murder. That while in jail she was carried before the county attorney and denied any knowledge of the crime. That after conferring with appellant she went before the county attorney again, and then made a statement or confession in which she stated that she and one Rufus Driver, her son-in-law, had entered into a conspiracy to kill Byron Alexander. That in pursuance of this conspiracy she and Rufus Driver went near the home of Byron Alexander and she went in, and after getting in the house, complained of the heat and raised a window, when the shots were fired from the outside that killed the child for which appellant was being prosecuted for killing. Driver was then arrested, but when the grand jury met and investigated the case, Driver was not indicted, but indictments were returned against appellant and his mother, the absent witness. It appears at the former term of court the cases against

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appellant and his mother were both continued, and then his mother made a bond and went to Louisiana where she remained until after the February term of court when appellant was tried. It further appears that on March 9th the case against appellant's mother was dismissed by the district attorney. Thereafter, on March 19th, when his case was called, he applied to continue on account of her absence, setting up that he expected to prove by her the facts she had stated in her confession to the county attorney, which evidence would go to show that Driver and not appellant was guilty of the offense. He gives as a reason for not summoning this witness when first indicted, that she was also indicted for an offense growing out of the same transaction, and, therefore, was not a competent witness in his behalf until the case against her had been dismissed, but the application fails to show sufficient diligence used by him during the ten days elapsing from the date her case was dismissed until his case was called for trial. He does not show the efforts he made, if any, to get in communication with this witness, or learn her whereabouts. It appears that on the day his case was called for trial he then knew her exact whereabouts and stated she was at Coushatta, Red River Parish, La. The application does not show the distance from Center to Coushatta, and to make the diligence sufficient it should have shown the distance, and that from the time the case against her was dismissed and he learned her exact location sufficient time did not remain for him to have taken her depositions. The record disclosing that he knew the location of the witness and that she was beyond the jurisdiction of the court, he should also have shown that he had made some efforts to take her depositions, or to obtain her attendance on court. While, as stated, the application does not show the distance, yet if we take our geographical knowledge into consideration, we know that Shelby County borders on the Louisiana line, and there is but one county or parish intervening between Shelby County and Red River Parish. (Harvey v. State, 35 Texas Crim. Rep., 545; De-Alberts v. State, 34 Texas Crim. Rep., 508; Hennessey v. State, 23 Texas Crim. App., 340; Swofford v. State, 3 Texas Crim. App., 76.) It may be said that the court permitted, without objection, the defendant to prove by the county attorney of Shelby County the facts stated by the witness at the time she made the confession, and this confession being admitted, it was thus in evidence that this absent witness had sworn to all the facts the defendant stated he expected to prove by her. In addition to this, all the evidence stated it was expected to prove by this witness was proven as undisputed facts, except that Driver went with her to the house that night and fired the shots after she opened the window, and this fact, we think, the record would disclose the court was authorized to find was not probably true. The undisputed facts show that the cartridges used were 40-44 Winchester shells, they being picked up off the ground. The record further discloses that appellant was the owner of a 40-44 Win-

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chester rifle, while it does not even suggest that Driver ever owned such a gun. If the State's witnesses are to be believed, appellant was seen to leave his house at night prior to the shooting, and return home just about daylight, riding a horse; that a horse of a neighbor of appellant was taken from his lot and ridden that night, and found next morning on the road between the home of appellant and the man from whose lot it had been taken. The other facts and circumstances point to appellant as the person who fired the shots, while the main prosecuting witness was shown beyond dispute to have stated at the time the first shot was fired it was appellant who was doing the shooting. As to how he knew this fact at that time is not explained by the record; he does not say that later he heard appellant's voice on the outside of the house, while the facts and circumstances point to appellant as the person who fired the shots, while are very weak. In Sec. 647 of White's Ann. Code Criminal Procedure, will be found numerous authorities holding that the court on appeal will not revise or reverse the judgment of the lower court refusing a continuance and overruling the application for a new trial based thereon, unless it is made to appear by the evidence adduced on the trial that the proposed absent testimony was probably true. (Wilkins v. State, 35 Texas Crim. Rep., 525; Weaver v. State, 34 Texas Crim. Rep., 282.) Again, in Harvey v. State, 35 Texas Crim. Rep., 545, this court held that the record showed that the defendant used the testimony of the witness on a former trial in application for a continuance, a motion for new trial was properly overruled. In this case the confession of the absent witness was introduced by defendant, in which all the testimony expected to be proven by her was admitted in evidence, and in the light of these decisions and the record in this case, we do not think the court erred in overruling the application for a continuance.

In another bill it is shown that Lena Hooper testified that just a short time before the homicide she saw appellant with a Winchester rifle, shooting at a dog. On cross-examination she was asked the evening after the homicide if she did not tell Edwin Booth that she did not remember how long it was prior to the homicide when she had seen appellant with this rifle and she denied making this statement to Edwin Booth. On redirect examination, in support of her testimony, it was proven that she had testified to the same facts as she had testified to in this case. This was prior to the time that appellant had placed Edwin Booth on the stand, but he had laid the predicate to impeach her, and while it was irregular to introduce the testimony at that time, yet as appellant did place Booth on the stand and sought to impeach her by offering testimony of a contradictory nature, the supporting testimony became admissible in evidence, and the irregularity as to the time of its introduction presents no such error of which he can complain. (Gibson v. State, 23 Texas Crim. App., 414.) Where evidence is introduced to impeach a wit-

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ness by proof of contradictory statements made to him by others. evidence is competent to show that he had previously made statements agreeing with and corroborating his testimony on the trial. (Hamilton v. State, 36 Texas Crim. Rep., 372; Kirk v. State, 35 Texas Crim. Rep., 224; English v. State, 34 Texas Crim. Rep., 190: Branch's Crim. Law, Sec. 874.)

While Edwin Booth was testifying in behalf of defendant, the defendant attempted to prove by him a self-serving declaration made by defendant to this witness after his arrest. State's counsel objected, and in stating his objection said it was hearsay and self-serving, and if they wanted to prove that fact let them place defendant on the stand. Defendant objected to the latter part of the remark of counsel for the State, which objection was sustained by the court. This was during the trial of the case, and at this time it could not have been known whether or not defendant would testify in the case, but appellant now contends that this incidental remark of the district attorney was a reference to defendant's failure to testify, and for which cause this case should be reversed. Appellant was seeking to elicit from the witness what the defendant had said in his own behalf on a certain occasion, and if this objection made by counsel for the State should be held to be a reference to defendant's failure to testify, incidentally made, this court has held in Combs v. State, 55 Texas Crim. Rep., 332: "that any bare allusion by the prosecuting attorney to the failure of the defendant to testify would not operate a reversal of the case." See also Cabrera v. State, 56 Texas Crim. Rep., 141; Johnson v. State, 53 Texas Crim. Rep., 339; Smith v. State, 52 Texas Crim. Rep., 344, and Am. & Eng. Ency. of Prac., Vol. 5, p. 339, where a long list of authorities will be found from this and other states so holding.

This being a case of circumstantial evidence, the testimony of defendant tending to prove an alibi, the court instructed the jury: "In this case the State relies for a conviction upon circumstantial evidence alone, and in order to warrant a conviction upon such evidence, each fact necessary to establish the guilt of the accused must be proved by competent evidence, beyond a reasonable doubt, and the facts and circumstances proved should not only be consistent with the guilt of the accused, but inconsistent with any other reasonable hypothesis or conclusion than that of his guilt, and produce in your minds a reasonable and moral certainty that the accused committed the offense.

"You are instructed that in addition to his plea of not guilty, the defendant in this case interposes what is known in legal phraseology as an alibi, that is, that if deceased was killed as alleged, the defendant was, at the time of such killing, at another and different place than at which such killing was done, and, therefore, was not and could not have been the person who killed the deceased, if he was killed.

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"Now, if the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the place where the deceased was killed, if killed, at the time of such killing, then you should acquit the defendant."

This form of charge on circumstantial evidence was specifically approved by this court in Henderson v. State, 50 Texas Crim. Rep., 266, and it has been frequently held by this court that no exact words need be used in charging on circumstantial evidence, but if the charge by a proper construction of the language used, instructed the jury that the evidence must exclude every other reasonable hypothesis than that of the guilt of the defendant, it is sufficient. (Branch's Crim. Law, Sec. 204.)

The charge on alibi is in accordance with the aproved forms, and is here recited that it may be construed in connection with the charge on circumstantial evidence to show that appellant could have possibly suffered no injury by reason of the fact that the words "and none other" were not used in the charge on circumstantial evidence.

Appellant also in the motion for new trial complains the court failed in his charge to instruct the jury that the defendant was permitted to testify in his own behalf, but his failure to do so should not be considered as a circumstance against him, nor be alluded to or discussed by the jury. There is no contention made that the jury alluded to or considered in their retirement the failure of defendant to testify, and under such circumstances no possible injury could have resulted to defendant. It has always been held that the court is not required to charge as to defendant's failure to testify, unless requested so to do. (Morrison v. State, 40 Texas Crim. Rep., 473; Prewett v. State, 41 Texas Crim. Rep., 262.)

The only other ground in the motion complains of the insufficiency of the testimony to sustain the verdict. If the State's testimony is to be given any credence, it was a cold-blooded attempt at assassination, being reduced to murder in the second degree only by reason of the fact that appellant failed to kill the person he intended to kill, and while it is a case of circumstantial evidence, the evidence is of that cogency to authorize the jury to find that he was the person who committed the offense.

Some affidavits have been filed in this court that since the trial of this case appellant has again been tried, as contended by him, for the same offense. This court cannot consider such matters, they only looking to the record made on the trial of the case from which the appeal is prosecuted. But we might add, having been tried and convicted in this case first, the plea of former jeopardy would not apply. If good on the latter case, it could only be interposed and considered when it was sought to try him the second time.

The judgment is affirmed.

Affirmed.

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BEN FLAGG, ALIAS JOHN RAINEY, V. STATE.

No. 2272. Decided February 12, 1913.

1.—Theft of Horse—Statement of Facts.

Where the alleged statement of facts was not approved by the trial judge, the same cannot be considered on appeal.

2.—Same—Circumstantial Evidence—Charge of Court.

While it would be better practice for the court to inform the jury, when he gives a charge on circumstantial evidence, yet it is not necessary to do so, where the court, in fact, charges on such evidence.

Appeal from the Criminal District Court of Dallas. Tried below before the Hon. Barry Miller.

Appeal from a conviction of theft of a horse; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—The statment of facts shows to have been signed only by counsel for the appellant and is not approved by the judge. The evidence, therefore, can not be considered. There is one bill of exceptions in the record which recites that the case is one of circumstantial evidence and the court, in charging upon this, gave the usual stereotyped charge, but nowhere told the jury the case at bar was one upon which the State relied upon circumstantial evidence for a conviction. So far as this phase of the case is concerned, we are of the opinion that this was not error. While it would be better for the court to inform the jury, when he gives a charge on circumstantial evidence, yet it is not necessary to do so. The jury would understand by reason of the fact that the court charged on circumstantial evidence that that was a part of the law of the case and that the case was one of circumstantial evidence. For collation of authorities see Branch's Crim. Law, Sec. 204.

The other questions in the absence of the evidence can not be considered. As the record is presented the judgment will be affirmed.

Affirmed.

CHARLIE JOHNSON V. STATE.

No. 2202. Decided February 12, 1913.

1.—Keeping Disorderly House—Evidence—Other Transactions.

Upon trial of keeping a disorderly house, there was no error in refusing to admit testimony as to other complaints against other parties by the State's witness; the latter being an officer.

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2.—Same—Evidence—Acts of Defendant After Arrest.

Where defendant was prosecuted for keeping a disorderly house for the sale of intoxicating liquors, etc., there was no error in rejecting testimony by the defense that he kept his doors closed after the complaint was filed against him.

3.—Same—Evidence—General Reputation.

Upon trial of keeping a disorderly house for the sale of intoxicating liquors without license, testimony as to the general reputation of the place is admissible in evidence. Following Joliff v. State, 53 Texas Crim. Rep., 61.

4.—Same—Evidence—Bill of Exceptions.

Where the bill of exceptions does not disclose what answer, if any, the witness made to the question, the matter cannot be reviewed on appeal. Following Tweedle v. State, 29 Texas Crim. Rep., 586.

5.—Same—Evidence—Revenue License.

Upon trial of keeping a disorderly house for the sale of intoxicating liquors without license, there was no error in permitting the witness to testify that he saw an internal revenue license posted in the place of defendant's building.

6.—Same—Evidence—Contradicting Witness.

Whenever either the State or the defendant seeks to impair the credit of a witness by a line of investigation, it is permissible for the opposite side to show the real facts in order that the jury may determine whether such circumstances do or do not affect his credit.

7.—Same—Rule Stated—Contradicting Witness.

Where, defendant, on cross-examination, elicited the fact from the State's witness that he had been indicted for running a gambling house, there was no error in permitting the State to show that such case was dismissed after an acquittal of one of his co-defendants.

8.—Same—Evidence—Charge of Court—Social Club—Subterfuge.

Where, upon trial of keeping a disorderly house for the sale of intoxicating liquors, etc., the defendant elicited testimony that the defendant was president of a social club, etc., but there was no evidence that a charter had been obtained, and that if it had been obtained it was a subterfuge and was no defense against selling liquors without license, and the court so instructed the jury, there was no error in refusing a requested instruction that the burden of proof was on the State in this behalf.

9.—Same—Charge of Court—Sunday Law.

Where defendant was charged with keeping a disorderly house for the sale of intoxicating liquors without license, the question of a violation of the Sunday Law was not involved, and there was no error in refusing requested charges thereon; besides, they were not the law.

Appeal from the County Court of Dallas County at Law. Tried below before the Hon. W. F, Whitehurst.

Appeal from a conviction of keeping a disorderly house for the sale of intoxicating liquors, etc.; penalty, a fine of $200 and twenty days confinement in the county jail.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

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HARPER, JUDGE.—Appellant was prosecuted under Article 500 of the Penal Code for keeping a disorderly house, as defined by Article 496, in that he did keep and was concerned in keeping a certain house as a house where spirituous, vinous and malt liquors were sold and kept for sale in quantities of one gallon and less than one gallons, without having obtained a license under the laws of this State to retail such liquors, and his punishment was assessed as provided in Article 500.

While J. W. Daniels was testifying as a witness for the State, on cross-examination he was asked whether or not he had filed complaints against other negro clubs, which question was objected to by the State. As to whether or not this officer had filed complaints against other clubs would be an immaterial inquiry. He did not file the complaint against the appellant in this case. The question in this case was, had this defendant violated the law, and not whether others had done so or not. He was also asked whether or not he had visited the place where defendant was charged with keeping a disorderly house *after* this complaint had been filed, to which an objection was sustained. The bill recites that he would have answered, had he been permitted to do so, that he had visited the place after the complaint was filed and found the doors closed to all persons except members of the club. It was not a material inquiry how the place was run *after the complaint was filed*; he could only be tried and convicted for the manner in which it was conducted *prior* to the complaint. When a person is charged with running a disorderly house under this statute, it has been repeatedly held that testimony as to the "general reputation" of the place is admissible in evidence, and there was no error in permitting this witness and other witnesses to testify as to the general reputation of the place. Joliff v. State, 53 Texas Crim. Rep., 61.

A number of bills were reserved to the testimony of witness W. A. Beal. The first is that an objection was made to the following question propounded by the State: "I will ask you to state whether there was boisterous or what kind of conduct was in there," the house defendant was charged with keeping? As the bill does not disclose what answer, if any, the witness made to the question, the question cannot be reviewed. (Tweedle v. State, 29 Texas Crim. App., 586.) It is shown by another bill that this witness was asked if he noticed any revenue license in this place of business, and that he was permitted to answer that he saw an internal revenue license posted in the place. The objection was "it was inadmissible because the license is the best evidence." It is always permissible for a witness to testify that he saw a revenue license posted in any given place. This is a fact which one can observe, if he sees it posted, and he can testify to it as any other fact. On cross-examination the defendant elicited from this witness that he had been indicted by the grand jury of Dallas County for running a gambling house,

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for the purpose of affecting his credit as a witness. On redirect the State then proved that the case had been dismissed against him after under which the indictment had been found against him, had been acquitted. After the defendant had injected into the case the fact that a felony indictment had been returned against this witness to impair his credit, it was permissible for the State to show that the circumstances were such that this fact should not impair the credit of the witness. The fact that this witness was not an officer at the time at which he was charged with running a gambling house was brought out by defendant on cross-examination, then it became permissible for the State to show on redirect examination that while not an officer at that time, yet he was a "special man detailed to keep order at the place" at which he was indicted for running a gambling house. Whenever either the State or defendant seeks to impair the credit of a witness by a line of investigation, it is permissible for the opposite side to show the real facts in order that the jury may determine whether such a circumstance does or does not affect his credit.

When the State closed its testimony, the defendant closed. On cross-examination of the witness for the State the defendant had sought to elicit that he was president of a social club, and in selling the intoxicating liquors he only "dispensed the liquors" to the members of the club. No charter from this or any other State, nor articles of agreement or any other instrument in writing was introduced in evidence showing for what purpose the club was organized, if in fact it was a club. The only fact in this respect testified to which indicates that it had a charter was by Jake Ward, who testified on cross-examination, "the members of the club got the charter." What the charter authorized is not shown by the record, and this instrument not being introduced in evidence, we are left to grope in the dark under what provision of the statutes it was issued, if in fact it had one. This witness does not claim to have seen it, and knows nothing of its contents. In fact he joined subsequently, paying twenty-five cents a week, saying if he did not pay this amount weekly his membership would be forfeited. Appellant requested the court to instruct the jury: "The burden of proof is on the State to prove the defendant's guilt, beyond a reasonable doubt and until the same is done, the defendant does not have to introduce any testimony or to take the stand himself in his defense, and in this case you are instructed that unless the State has proven beyond a reasonable doubt that the Dallas Social Club was not a bona fide club, you will acquit the defendant, even though he did not put on any testimony or take the stand in his own behalf, or if you have a reasonable doubt as whether the State has made such proof or not, you will acquit the defendant, even though you may believe that liquor was dispensed to its members even on Sunday." The first count in the information charged "that one Charlie Johnson, heretofore on the 3rd day

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of November, A. D. 1911, in the County and State aforesaid, did unlawfully and directly and indirectly keep and was concerned in keeping a certain house then and there situated, as a house where spirituous, vinous and malt liquors were sold and kept for sale, in quantities of one gallon and less than one gallon, without having first obtained a license under the laws of the State of Texas, to retail such liquors."

It is thus seen that the State had made no charge as to appellant conducting a place as a social club or any character of club, but charged him individually with the offense. The State offered no proof that a club existed or defendant had any connection with any club. On cross-examination of the State's witnesses the defendant sought to elicit testimony that in selling the intoxicating liquors he was shown to have sold, he was acting for a club, and on this issue the court instructed the jury in his main charge:

"You are further instructed that if you believe from the evidence that the defendant was in the employ of a *bona fide social club* organized for social purposes and not organized for profit, or if you have a reasonable doubt thereof, then you will acquit the defendant. But if you believe that said club was organized and run as a subterfuge to dispense and sell intoxicating liquors, without having obtained a license, and further believe that the defendant was keeper of said place or was concerned in keeping said place, then the defendant would be guilty. * * * In all criminal cases the burden of proof is on the State. The defendant is presumed to be innocent until his guilt is established by legal evidence, beyond a reasonable doubt; and in case you have reasonable doubt as to the defendant's guilt, you will acquit him and say by your verdict 'not guilty.'"

We think these charges of the court were more appropriate under the evidence than the special charge requested above, and the court did not err in refusing to give this special charge. While the evidence does not disclose that a charter had been obtained, nor what it authorized to be done, if one had been obtained, yet if a valid charter had been introduced in evidence, and the testimony raised the issue that it had been obtained to pursue a business illegally, it would be proper to submit that issue to the jury. And to say the least, we think the evidence clearly raises the issue that if a charter had been obtained, it was obtained for the purpose of selling intoxicating liquors without obtaining a license, and running a joint in connection therewith. J. W. Daniels testified: "That building down there where this club is run is a two-story frame building and the front door is on Market Street—an east front, and then you go into a hall, and then there is a little office right here by the first room, and then a room back here. There are four rooms, I believe, on the south side of the hall running east and west; then there is a dance hall. This small hall leading from Market Street runs right into what they use as a dance hall, and then there are other rooms there that have tables in

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them. And then upstairs they have rooms, and I have seen them carrying drinks up there on waiters and serving them to men and women around tables. I think there are also about four rooms on the north side of that small hall running through the house. There are also chairs and tables in those rooms where they go in there and sit down and drink. I did not see any library or any books in there. I do not remember whether I saw any pool table upstairs. Also noticed a United States Revenue license in there. I do not know whether other clubs in Dallas take out revenue license or not. I do not belong to any clubs or to any secret society that has a club in connection with it. That house down there is a nice commodious building with several rooms. I did see one mattress in the upstairs room; did not see any beds up there, but saw some whores in the house; saw Marietta Lewis and Lady Wright; I know Marietta Lewis is a whore, because I have seen her."

Other witnesses corroborate this witness as to the character of the place, and W. A. Beal testified: "Prior to November 7th I saw the defendant, Charley Johnson, in a negro club at the corner of Market and Young Streets in Dallas; he was tending bar there Sunday afternoon; the bar was about some twelve to sixteen feet long, I would say, and the bar was situated exactly like the ordinary saloon bar would be—having a front bar and a back bar, and where they had cigars liquors, wines and whisky, carrying a stock there like you would see in a saloon; I saw the defendant there on the 5th day of November, 1911. The stuff he was selling was in glass bottles just like they are always in. I saw bottles labeled Hill & Hill, with the seal unbroken, and also some Hill & Hill bottles with the seal broken, and there was also bottles labeled Budweiser beer; both whisky and beer. I saw the defendant approximately make five or six sales of whisky when I was down there prior to the 7th of November, 1911, in quantities like the regular drinks of whisky—less than a gallon served over the bar, just like the ordinary small whisky glass. I also saw the defendant make sales of bottles of beer—as many as five or six sales; saw it all at the time I am speaking of—the 7th of November; have seen him make similar sales as much as a week before the 7th of November, one or two sales of a bottle of beer.

"I observed the rooms in the house. It is rather a roomy house, with some twelve or fifteen rooms to it. In one room it was there the bar was—the bar room—and then in other rooms there were tables and chairs; just small tables, and I saw liquor served on them; never saw them used for anything else; then in one room there was a piano, and the other rooms were all fixed with these little tables and chairs which were being used to serve drinks on. There was a sort of mixed crowd of both men and women, and downstairs some of them were singing, drinking and joking."

We think this testimony fully authorized the court to submit to the jury whether or not the club, if one in fact existed, was but a subter-

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fuge to cover up an unlawful purpose and design, and the jury having so found, we will not disturb their verdict.

The other special charges requested were covered by the court's charge insofar as they are the law. Insofar as the proof showing sales to have taken place on Sunday, there was no allegation in the information in regard to this matter, and the question is not presented in a way we can review it, but we will say there was no error in refusing the charges requested in regard to sales on Sunday, for they are not the law of this State.

The judgment is affirmed.

Affirmed.

LEWIS BLACKSHEAR V. STATE.

No. 2141. Decided February 16, 1913.

1.—Murder—Charge of Court—Aggravated Assault—Deadly Weapon.

Where, upon trial of murder and a conviction of manslaughter, there was no testimony that the knife used by the defendant was a deadly weapon, and it was not conclusively shown that defendant intended to kill deceased, the court should have submitted the issue of aggravated assault, and the failure to do so was reversible error.

2.—Same—Self-defense.

Where it was not clear that the issue of self-defense was raised by the evidence and the cause was remanded on other grounds, this question need not be decided; however, the fact that others and not the deceased threw rocks at defendant would not justify the homicide.

3.—Same—Charge of Court—Principals—Converse Proposition.

Where, upon trial of murder and a conviction of manslaughter, the evidence showed that defendant acted with others in the commission of the offense, the court properly submitted the law on principals; however, the converse proposition should have also been submitted. Following McMahon v. State, 46 Texas Crim. Rep., 540, and other cases.

4.—Same—Charge of Court—Manslaughter.

Where, upon trial of murder, the evidence raised the issue of manslaughter, the court properly submitted that issue to the jury.

5.—Same—Negligent Homicide—Charge of Court.

Where the evidence did not raise the issue of negligent homicide, there was no error in the court's failure to charge thereon.

6.—Same—Deadly Weapons—Charge of Court.

Where the question of deadly weapon was raised by the evidence, the court should have charged thereon.

Appeal from the District Court of Grimes. Tried below before the Hon. S. W. Dean.

Appeal from a conviction of manslaughter; penalty, three years imprisonment in the penitentiary.

The opinion states the case.

No brief on file for appellant.

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C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—Upon an indictment charging murder appellant was convicted of manslaughter.

There are but few questions necessary to be decided in this case. It is unnecessary to detail the evidence. The State's theory and evidence would show an unprovoked killing by appellant of the deceased without any cause, and without the deceased doing or saying anything to justify it. The evidence shows that the appellant got into a fight with a negro preacher on the train just before it stopped, when appellant and several other negroes got off of the train; that in the fight between appellant and the negro preacher on the train, appellant got out his knife; that another negro, it seems, on the train took up the difficulty between appellant and the preacher, and appellant and he, just after getting off the train, had a fight. What occurred on the train and immediately after they got off was more or less a continuation of the same trouble. After more or less fighting on the ground, just after getting off of the train, appellant became separated from persons with whom he had then been fighting and some one or more, after getting off a little distance, threw rocks at appellant and struck him. It was at night, but not very dark, some of the witnesses testifying that they could distinguish between a white man and a negro and that where they knew a party they could distinguish and identify such party. All the testimony shows that the deceased had nothing to do with the fight at any time and did not throw the rocks. The rocks were thrown at appellant from a point beyond and in the direction from deceased. The testimony does not disclose by whom they were thrown. Appellant testified that he and deceased were friendly; that there had been no trouble between them. Appellant claimed he did not know that it was deceased at the time he caught hold of him and cut him; that he didn't recognize who it was. One of the State's witnesses testified that the knife that appellant had when he got off the train was a long one-bladed barlow knife with a spring back. Some of appellant's witnesses testified that the knife that appellant had was a very short knife, and while neither of the knives are sufficiently described from the testimony so that we can tell what the size and length of the knife was, two theories are clearly presented. One was that it was a long knife,—the other that it was a very short or little knife. The State's witnesses testify positively that appellant stabbed deceased in the neck with his knife. Appellant himself and several of his witnesses swear positively that appellant did not stab the deceased in the neck at all and that the only place that he cut him was on the arm, and that he used a small knife. The testimony does not disclose whether the cuts on the arm went through the sleeves and cut the flesh of the deceased or not. The indications are that they did not. Again, the State's theory was, and had testimony to show it, that appellant and only appellant cut and stabbed deceased in the

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neck, while the testimony of the appellant and his witnesses was that appellant did not cut deceased in the neck at all, but that another, Henry McGinty, did so. There was no testimony by any witness that the knife appellant's witnesses show he had was a deadly weapon. From his testimony and standpoint, the manner of its use did not conclusively show his intention to kill.

Under this state of the proof, as shown by the record, appellant complained properly that the testimony raised, and the court should have charged on aggravated assault. The court did not charge on aggravated assault. In our opinion the appellant's contention is correct and the court should have charged on aggravated assault, and because thereof the case must be reversed. See collation of the cases in sec. 434, Branch's Crim. Law of Texas.

Appellant also complains that the evidence raised, and the court should have charged on self-defense. No charge on that subject was given by the court. As the case must be reversed on the failure to charge on aggravated assault, it is not necessary for us to determine in this case whether the evidence, as presented, calls for a charge on self-defense. We are inclined to believe that it did. However, in another trial the court can determine whether the evidence then raises self-defense. If so, of course the court must charge thereon. If it does not it would be improper for the court to submit self-defense. Certainly the fact that some other, and not deceased, had thrown rocks and struck appellant, would not justify him in assaulting and killing the deceased, because he first got to him, and because some one not identified threw rocks at him from that direction.

The appellant also claims that the evidence did not justify the court to submit the law of principals in the case. In our opinion the evidence did authorize and require the court to submit a correct charge on that subject. The mere fact that appellant testified he had no previous agreement with his father-in-law, Henry McGinty, to act together with him in assaulting and killing the deceased, would not of itself prevent the question of principals being raised. The fact that they were acting together can be shown by circumstantial evidence as well as by direct and positive testimony. The evidence, as disclosed by the record, in our opinion as stated above, justified the court to submit the question of principals to the jury for a finding. However, we suggest that on another trial the court should submit the converse of the proposition. Jackson v. State, 20 Texas Crim. App., 190; McMahon v. State, 46 Texas Crim. Rep., 540; Monroe v. State, 47 Texas Crim. App., 59; Wood v. State, 28 Texas Crim. App., 14; Cecil v. State, 44 Texas Crim. Rep., 450; Goodwin v. State, 58 Texas Crim. Rep., 496.

Appellant having been acquitted of murder in the first and second degrees, in another trial he can be tried only for manslaughter, and whatever grade of assault, if any, is raised by the testimony. Appellant contends that the court erred in charging on manslaughter

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because the evidence did not show or tend to show that offense. The evidence did raise, and the question should have been submitted to the jury.

The evidence as presented in this case did not raise negligent homicide. If that question is properly raised on another trial, of course the court will charge properly thereon.

From the state of proof developed by this case we think appellant's contention that the court should have charged on a deadly weapon is also well taken.

There is no other question raised necessary to be discussed and decided. For the errors above pointed out the judgment is reversed and the cause remanded.

Reversed and remanded.

T. E. MEADOWS, ALIAS S. S. MANNING, v. STATE.

No. 2149. Decided February 16, 1913.

1.—Theft of Mules—Continuance.

Where the application for continuance showed a want of diligence, and that the absent testimony was not probably true, there was no error in overruling same.

2.—Same—Charge of Court—Circumstantial Evidence.

It is only when the case is proven by circumstantial evidence alone that a charge on circumstantial evidence is required.

3.—Same—Sufficiency of the Evidence.

Where, upon trial of theft of two mules, the evidence sustained the conviction, there was no error.

Appeal from the District Court of McLennan. Trial before the Hon. Richard I. Munroe. Appeal from a conviction of theft of mules; penalty four years' imprisonment in the penitentiary.

The opinion states the case.

Lester & Taylor, for appellant.—On question of circumstantial evidence: Leftwich v. State, 34 Texas Crim. Rep., 489; Martin v. State, 32 id, 441; Polanka v. State, 33 id, 634; Robertson v. State, 33 id, 366.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—Appellant was convicted of the theft of two mules and his punishment fixed at four years confinement in the penitentiary.

The evidence is amply sufficient to sustain the verdict.

The application for a continuance shows such a lack of diligence to procure the attendance of witnesses as to justify the court in overruling it. (Giles v. State, 66 Tex. Crim. Rep., 638; 148 S. W. Rep., 317.) Besides the testimony, admissions and statements of the appellant himself are so unreasonable, contradictory and confusing as to clearly justify the court to believe none of the claimed absent wit-

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nesses, none of whom had ever been subpœnaed, or would testify as claimed by him, and if they had, that their testimony would not probably be true and would not have changed the result of the trial.

The court did not err in not giving appellant's requested charge on circumstantial evidence. The admissions and testimony of the appellant himself unquestionably show that he took the mules at the time and place they were stolen and he was within two or three hours thereafter caught in the actual possession thereof some twelve or fourteen miles from where he had taken them. It is only when the case is proven by circumstantial evidence alone that a charge on circumstantial evidence is necessary. Sec. 813, sub. 2, p. 531, White's C. C. P.

The court gave a full and fair charge in the case, submitting every issue in any way raised by the testimony, all of which was found against appellant, with the amplest evidence to support it.

The judgment is affirmed.

Affirmed.

MURRELL ALSUP V. STATE.

No. 2061. Decided December 18, 1912.

Rehearing Denied February 19, 1913.

1.—Burglary—Charge of Court—Requested Charges.

Where, upon trial of burglary, the refused requested charges were covered by the main charge of the court, there was no error.

2.—Same—Want of Consent.

In a prosecution for burglary, the indictment need not allege that entry was without the consent of the owner, and the State is not required to prove the want of consent of persons not named in the indictment.

3.—Same—Evidence—Res Gestae.

Upon trial of burglary, there was no error in permitting the State to show what the defendant did when the witnesses came to the alleged house to arrest him. This was res gestae.

4.—Same—Evidence—Declarations of Third Parties.

Upon trial of burglary, there was no error in admitting the statements of the State's witness as to what he did in trying to shield the prosecutrix shortly before the burglary from the defendant because defendant was drunk, etc., there being other testimony to the same effect which led up to what defendant said he was going to do.

5.—Same—Evidence—Res Gestae.

Upon trial of burglary, there was no error in admitting testimony as to the remarks of the officer with reference to the defendant resisting arrest just before he arrested him, it being part of the res gestae.

6.—Same—Evidence—Declarations of Third Party.

Upon trial of burglary, there was no error in admitting testimony showing the condition of the room alleged to have been burglarized immediately after defendant was arrested.

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7.—Same—Evidence—Private Residence.

Upon trial of burglary, there was no error in permitting the owner of the house to testify that the same was a private residence and who constituted his family.

8.—Same—Verdict—Words and Phrases.

Where, upon trial of burglary, the verdict of the jury misspelled the words "guilty and assess," but there could be no misunderstanding as to the meaning of the verdict, there was no reversible error.

9.—Same—Verdict by Lot.

Where the trial court heard testimony on defendant's motion for new trial on the ground that the verdict was arrived at by lot and found against the defendant, there was no error.

Appeal from the District Court of Comanche. Tried below before the Hon. J. H. Arnold.

Appeal from a conviction of burglary; penalty, three years and three months imprisonment in the penitentiary.

The opinion states the case.

Smith & Palmer and *Eidson & Eidson,* for appellant.—On question of admitting res gestae statements: Dowell v. State, 58 Tex. Crim. Rep., 482; 126 S. W. Rep., 871; Richmond v. State, 58 Tex. Crim. Rep., 435; 126 S. W. Rep., 596; Rowan v. State, 57 Tex. Crim. Rep., 625; 124 S. W. Rep., 68.

On the question of the insufficiency of the verdict: Brookman v. State, 906 S. W. Rep., 928; Sanders v. State, 78 S. W. Rep., 518; White v. State, 40 S. W. Rep., 789.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—The Assistant Attorney-General has briefed this case so thoroughly, and presented the questions so correctly, we adopt his brief as the opinion of the court:

"Appellant was convicted in the District Court of Comanche County, Texas, under an indictment charging him with burglary with intent to rape, and his punishment was assessed at confinement in the penitentiary for the term of three years and three months.

The facts in this case are substantially as follows: Miss Hettie Roberson, who was a second cousin to Mrs. Hunter Watson, was visiting at the home of Hunter Watson in the town of Gustine, Comanche County, Texas, on the 23rd of March, 1912. On that day Hunter Watson was out of the city. The Gustine Mercantile Co. held a millinery opening on that day and there was an unusually large crowd in attendance, listening to the music, etc. Miss Hettie Roberson, who had worked for the store the year before, was at the opening, as was also Murrell Alsup, the defendant. The defendant asked one J. W. Peeples if he had seen anything of the 'ex-clerk,' whom Peeples understood to mean Miss Roberson, and he replied that he had seen her in there, but told the defendant that he thought she had gone to

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Watson's store. The defendant then told Peeples that he was going 'to have a piece of it,' and left the store, going in the general direction of Watson's store, and was not seen by Peeples any more that day. Peeples testified that Miss Roberson had not left the store when he told defendant that she had gone to Watson's, but that he saw defendant was drunk, or rather drinking, and was afraid he would do or say something to Miss Roberson in there that he ought not to. Defendant was married at that time, but the year before he kept company with Miss Roberson. About 5:00 that evening Miss Roberson left the store in company with one Graham Tullos, going to the home of Hunter Watson. They had gone about 100 yards and were passing the lumber yard, when the defendant who was following them, called to Tullos 'Graham,' but Tullos paid no attention to him, and he called again, 'Oh, Graham,'' and still Tullos paid no attention to him, and then he called again, 'Graham, by G—d, stop.' Tullos then stopped and waited for defendant, but told Miss Roberson to go on home (about 300 yards further). When the defendant caught up with Tullos he said, 'Graham, by G—d, you are having a time with that girl and I am going to have some of it too,' and he says, 'My life is a misery to me, and I had just as soon be in the penitentiary as not,' and then said, 'By G—d, I am going to fuck her or kill her.' Tullos then tried to get defendant to go on back, which he refused to do, and he (Tullos) then stopped in at the lumber yard and spoke to one K. Roberts, and then went home and came back by the Gustine Mercantile Co. and saw Sam Hancock, a deputy sheriff, and the two got in a buggy and went at a rapid gait to Watson's house, where Miss Roberson was boarding. They first saw defendant next in Watson's yard, and then saw him climb in a window. Mrs. Watson testified that when Miss Roberson came in she looked flushed and called her attention to some one coming and told her (Mrs. Watson) that she did not want to see him, and she (Mrs. Watson) told her, 'Certainly you will not have to see him.' They locked all the doors to the house, and got in a room with two doors between them and the room defendant entered. K. Roberts phoned over and asked them if there was not a drunken man at their house and if they did not want him to come over and help, and Mrs. Watson told him to come. Deputy Sheriff Hancock and Graham Tullos came in about this time and ran in the house and heard defendant say, 'By G—d, where is she,' and Hancock then opened the door to the room where defendant was and said, 'Come on and go with me, Murrell,' and he says, 'No, by G—d, I am not going.' Hancock and Tullos then grabbed defendant and threw him down, and Hancock got on top of him and held him while Tullos went to the buggy and got a rope to tie him with, and about that time K. Roberts came in, which was about three or four minutes after Hancock and Tullos first got there. Defendant was cursing and fighting all this time, but Hancock, Tullos and Roberts got him tied and took him out to the buggy and left. Mrs. Watson

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testifies that when she went in the room after these men had left, one of the windows was up; that it had been down all winter; was hard to raise, etc. She further testified that there was mud all over the floor where they had been scuffling; that there was mud on the window sill of the window that was half open and mud on the lace curtains of the window, showing where defendant entered the room. Mr. Watson testified that he did not give his consent to defendant to enter his house. This is substantially all the testimony. The defendant introduced no testimony. It was shown by practically all the witnesses that the defendant was drinking on the day this offense is alleged to have been committed.

Appellant has filed ten bills of exceptions and also numerous assignments in his motion for new trial. Bills of exceptions Nos. 1, 3, and 4 insist that the court erred in refusing each of the following special charges: "Gentlemen of the Jury: You are instructed as a part of the law of this case that before you would be warranted in finding a verdict of guilty, it is imperative on the State to show by legal and competent evidence, in addition of other matters and things hereinbefore charged, beyond a reasonable doubt, that the defendant did break and enter the house in question and that at the very time of breaking and entering, if he did so, that he then and there had the specific intent to commit an assault and battery in and upon the person of Hettie Roberson, and that he had the specific intent then and there to use force on the Said Hettie Roberson, and had the specific intent to use all force that might become necessary to overpower and overcome all resistance that the said Hettie Roberson might make, and that he had the intent then and there to ravish and carnally know the said Hettie Roberson, and unless you believe from the evidence in this case that the defendant at the time he entered said building, if he did so, had the specific intent to do all the matters and things hereinbefore stated at the very time of breaking and entering said building, if he did so, you will find the defendant not guilty."

"Gentlemen of the Jury: You are further instructed that if you should believe that the defendant intended to have sexual intercourse with Hettie Robertson, but have a reasonable doubt as to whether he intended to rape her by force, while in said house, you will acquit the defendant."

"Gentlemen of the Jury: If you should believe that the defendant by force did break and enter the house in question, and if you should further believe that the defendant intended to have sexual intercourse with Hettie Roberson, but should have a reasonable doubt as to whether he intended to have such intercourse by force, as force has been defined to you, you will acquit the defendant."

The court qualified each of these bills, stating that he refused these various special charges because the matter covered in said charges was sufficiently covered in the court's main charge, and in defendant's

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special requested charge No. 2, which was given to the jury. The court in his main charge instructed the jury as follows:

"Now if you believe from the evidence beyond a reasonable doubt that the defendant * * * did then and there break and enter the house * * * with the specific intent on his part then and there to commit the crime of rape by force upon the person of Miss Hettie Roberson, as rape by force has been defined to you in this charge, then in that event you will find the defendant guilty," etc.

In defining rape by force the court instructed the jury that it was essential to constitute rape by force, among other things, "that the prosecutrix at the time and place thereof used all the strength in resistance she could employ and at no time consented or yielded to the defendant, but that the defendant used such degree of force as was sufficient to overcome and which does overcome all of the resistance with which the prosecutrix opposes the act."

Defendant's requested charge given by the court reads as follows: "In order for the defendant to be convicted in this case it must be shown by the evidence beyond a reasonable doubt that defendant when he entered the house had the specific intent to commit rape by force, that is, that he intended to have carnal knowledge of Hettie Roberson without her consent, using sufficient force to overcome all the resistance that the said Hettie Roberson was capable of putting forth, and unless you do so find you will acquit the defendant and say by your verdict not guilty."

The main charge of the court and this special requested charge of defendant which was given sufficiently covered the matter, and the court's action in refusing each of the special requested charges in question was not erroneous.

Bill of exceptions No. 2 insists that the court erred in refusing defendant's special requested charge, which was as follows: 'The evidence showing that Hunter Watson was away from home at the time of the alleged burglarious entry into his house, and that his wife, Mrs. Watson, was at home and in charge of and in possession of said house, it is necessary that the want of consent be shown on the part of the said Mrs. Watson, and unless the evidence shows beyond a reasonable doubt that defendant entered without the consent of Mrs. Watson you will find the defendant not guilty.'

Indictment need not allege that 'entry' was without the consent of the owner. Sullivan v. State, 13 Texas Crim. App., 462; Smith v. State, 22 Texas Crim. App., 350; Williams v. State, 41 Texas, 98; Reed v. State, 14 Texas Crim. App., 662; Buntain v. State, 15 Texas Crim. App., 485; Langford v. State, 17 Texas Crim. App., 445; Black v. State, 18 Texas Crim. App., 124; Sampson v. State, 20 S. W. Rep., 708. And the State is not required to prove the want of consent of persons not named in the indictment. Skaggs v. State, 56 Texas Crim. Rep., 79; Willis v. State, 33 Texas Crim. Rep., 168; Holmes v. State,

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42 S. W. Rep., 979; Hurley v. State, 35 Texas Crim. Rep., 382; Coates v. State, 31 Texas Crim. Rep., 257.

Bills of exception Nos. 5 and 10 complain of the action of the court in permitting witnesses Sam Hancock and Graham Tullos to testify to what the defendant did when they came to the house to get him, i. e., that he was swearing, bucking and rearing; that he called them sons-of-bitches, etc. The action of the court in permitting these witnesses to testify to these matters was not error, as shown by his qualification to these bills, in that it was res gestae of the offense.

Bill of exceptions No. 6 complains of the action of the court in permitting the witness, J. W. Peeples, after testifying that defendant asked him where the 'ex-clerk' was, and that he told defendant she had gone to Watson's store, while in truth and infact she had not gone but was in the store at that very time and that he was standing between her and the defendant to keep the defendant from seeing her, etc.; and that the defendant was drunk, and to testify that the reason he did this was defendant was drunk and he was afraid he might say or do something to Miss Roberson there in the store that he ought not to. The objection is that it was improper for the witness to give his inference, opinion and conclusions as to what the defendant intended to do or probably would do when he found Miss Roberson, etc. In view of all the facts and circumstances of the case, this testimony could not have been prejudicial to the defendant, if inadmissible. The record otherwise clearly shows that he was drunk on this occasion, and this testimony merely led up to what defendant said he was going to do.

Bill of exceptions No. 7 complains that the court erred in permitting the witness, Sam Hancock (deputy sheriff), to testify that when he got to the house of Hunter Watson, he knew the defendant was in there somewhere, and he told the women folks to step out that he might have to shoot, and they stepped back into another room. The court qualified this bill as follows: 'What the witness was permitted to testify transpired while the defendant was in another room of the same house where witness was, and the defendant then actually, according to the State's contention, engaged in the commission of the crime charged against him. The remark of Hancock was made only an instant before he opened the door of the room in which the defendant was at said time and where, when the door was opened by Hancock, he was confronted by the defendant. I admitted the evidence as a part of the res gestae.' The court did not err in this respect, because the defendant's conduct at the time was the cause of the remark.

Bill of exceptions No. 8 complains that the court erred in permitting Mrs. Watson to testify as to the condition of the room immediately after the officer left with the defendant, as to mud being on the floor, etc. There is no merit presented by this bill, as it is but shown that the window was raised, the window sill muddy, and the

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circumstances were admitted to show the place of entry of defendant.

Bill of exceptions No. 9 insists that the court erred in permitting Hunter Watson to testify that the house alleged to have been burglarized was his private residence and to state what his family consisted of. There is no merit presented by this bill, as it was admissible to show that appellant had no right to enter the house in the manner he did.

The only matters of any importance presented in the motion for new trial are as follows: 1. That the verdict of the jury is unintelligible, uncertain and without meaning on its face. The verdict reads as follows: 'We the jury find the defendant *guidy* and *asscss* his punishment at three years and three months in the penitentiary.' These misspelled words in the verdict would not be ground for new trial. In the case of Harris v. State, 34 S. W. Rep., 922, a verdict which read, 'We the jury find the defendant guitty and assess his punishmz at 90 days imp. county jale,' was held good. In Attaway v. State, 31 Texas Crim. Rep., 475, the use of the word 'guity' in the verdict was held sufficient. See also McGee v. State, 39 Texas Crim. Rep., 190, and Harwell v. State, 22 Texas Crim. App., 251. There could be no misunderstanding as to the verdict of the jury.

2. That the verdict of the jury is erroneous because it was arrived at by lot. The testimony adduced on the hearing of the motion does not support the contention of appellant in this regard. The court heard the testimony, and finds against the contention of appellant, and we think correctly so."

The judgment is affirmed.

Affirmed.

[Rehearing denied February 19, 1913.—Reporter.]

FRED JOHNSON v. STATE.

No. 2126. Decided January 8, 1913.

Rehearing Denied February 19, 1913.

1.—Murder—Statement of Facts—Practice on Appeal.

In the absence of a statement of facts, the sufficiency of the evidence and the rejection and admission of testimony and the charge of the court cannot be considered.

2.—Same—Jurisdiction—Transfer of Indictment.

Where the transfer of the indictment from one court to the other was made when the court to which the indictment was referred had the legal authority to acquire jurisdiction thereof, and the law authorized the filing of the papers in that court, it assumed jurisdiction, and it was not necessary to the legal existence of said court that a term under it should have been held, the Act creating said court being effective at the time the papers were filed.

Appeal from the Criminal District Court No. 2 of Dallas. Tried below before the Hon. Barry Miller.

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Appeal from a conviction of murder in the second degree; penalty, five years imprisonment in the penitentiary.

The opinion states the case.

M. T. Lively and *Lightfoot, Brady & Robertson,* for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was convicted of murder in the second degree, his punishment being assessed at five years confinement in the penitentiary.

Some of the grounds of the motion for new trial relate to the sufficiency of the evidence, which cannot be considered because the statement of facts is not before the court. Another ground of the motion urges that the court erred in admitting and rejecting testimony. There being no bills of exceptions in the record, these matters cannot be considered. For the same reason the alleged errors in the charge cannot be regarded as erroneous. The charge as given is such as could be applicable to a state of facts provable under the allegations in the indictment.

The judgment is ordered to be affirmed.

Affirmed.

ON REHEARING.

February 19, 1913.

DAVIDSON, PRESIDING JUDGE.—At a former day of the term the judgment was affirmed, there being no statement of facts or bills of exceptions to be considered.

A motion for rehearing is filed, alleging that the Criminal District Court No. 2 of Dallas County did not have jurisdiction to try the case. The allegations in the motion are to this effect: That the indictment was preferred in the Criminal District Court of Dallas County by the grand jury empaneled at the July Term 1911; that thereafter, on the 21st of December, by an order made and entered in the Criminal District Court, the indictment was transferred to Criminal District Court of Dallas County No. 2. The claim is made in the motion that Criminal District Court No. 2 at that time could not acquire jurisdiction and that it had no legal existence as such Criminal District Court No. 2; that Criminal District Court No. 2 was created by an Act of the First Called Session of the Thirty-second Legislature and was empowered to hold four terms each year, beginning on the first Monday in April, first Monday in July, first Monday in October and first Monday in January; that the Act did not become a law until ninety days after the adjournment of said special session, which adjournment occurred on the 29th day of August, 1911; that the first term of court which it was possible to hold under said Act would not

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begin until the first Monday in January, 1912, that being the beginning of the first term of court provided for in the Act creating the court. It is, therefore, contended that the order made on the 21st day of December, 1911, transferring the indictment and papers from the Dallas Criminal District Court to Criminal District Court No. 2, was null and void, inasmuch as the transfer occurred at a time when Criminal District Court No. 2 did not and could not have had an actual or legal existence. Under the facts stated in this connection we are of opinion the conclusion reached by appellant in his motion for new trial is not legally correct. It was not necessary to the legal existence of the court that a term under it should be held as a prerequisite to its being a legal court. Ninety days after the adjournment of the Legislature,—the 29th of August,—the court became a court under the Act of the Legislature, the law putting the court into existence ninety days after the adjournment. At the expiration of ninety days, which would be the 29th or 30th, as the case may be, of November, 1911, the Criminal District Court No. 2 of Dallas County became a legal Criminal District Court by virtue of that Act. It was not necessary to its existence or its legality as a court that it should hold a term of court on the first Monday in January, 1912. It became a legal existing court, at least, by the 30th of November, if not on the 29th. Therefore, it was legal and the filing of criminal cases any time after the ninety days would be legal and proper. The court could acquire jurisdiction, but could not try a case, of course, until the term of court began which was the first Monday in January following. The transfer of cases then from the Criminal District Court to Criminal District Court No. 2 was legal, and the filing in that court was legal. The court had the legal authority to acquire jurisdiction so far as filing papers, etc., is concerned, and the law authorized the filing of such papers as were to be filed in that court at any time after the Act of the Legislature became operative. This is the only matter necessary to be considered.

Believing the appellant's contention in this respect is not correct nor legal, the motion for rehearing is overruled.

Overruled.

J. B. WITTY V. STATE.

No. 1917. Decided February 19, 1913.

1.—Murder—Insanity—Judgment in County Court—Presumption.

Where defendant, about two months after the homicide, was adjudged insane in the County Court and sent to the lunatic asylum, and afterwards was either discharged or got out in some way and placed on trial for murder, said judgment was no bar to such prosecution, although it covered the time for ten or twelve months prior to the time of the adjudication, but it will be presumed that insanity continued to the time of the alleged offense, and unless such presumption is overcome by competent evidence, the accused is entitled to an acquittal.

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2.—Same—Rule Stated—Presumption—Insanity—Burden of Proof.

Where insanity is once shown to exist, it will be presumed to continue, and a judgment in the County Court declaring defendant insane and that he had been insane for ten or twelve months, which overreached the time of the alleged homicide, is prima facie evidence of insanity both before and after its rendition, and shifts the burden of proof to the State. Following Hunt v. State, 33 Texas Crim. Rep., 252, and other cases.

3.—Same—Charge of Court—Insanity—Burden on State, When.

Where defendant was charged with murder, and the judgment of the County Court adjudging defendant insane, and that he had been insane for a time reaching over the date of the homicide, was introduced in evidence, it was reversible error to charge the jury that they could not be bound by said judgment, as it was found after the alleged shooting, and that it rested upon the defendant to show that he was insane at the very time of the homicide; but the burden was on the State to show the sanity of the accused at the time of the alleged offense, in the face of the judgment from the County Court finding him insane.

4.—Same—Lucid Intervals—Rule Stated.

Where defendant is once adjudged insane under proper proceedings, the presumption is that insanity continues, and the burden is upon the State to show sanity or lucid intervals at the time of the commission of the offense.

5.—Same—Practice—Lunatico Inquirendo.

Where defendant was adjudged insane some time before his trial for murder, and shortly after the commission of the offense, he should have been placed upon trial as to his sanity before he was placed on trial for murder. Following Guagando v. State, 41 Texas, 626.

6.—Same—Evidence—Non-expert Testimony—Insanity.

Where, upon trial of murder, it was not shown by the witnesses that they knew enough of the traits of life and disposition and other matters as to defendant's sanity to place them in the attitude to say whether he knew right from wrong, or to express an intelligent conclusion as to his sanity, their opinion as to his sanity is inadmissible. Following Jordan v. State, 141 S. W. Rep., 786.

7.—Same—Expert Testimony—Insanity—Reproduction of Evidence.

Where an expert witness had testified as to the insanity of the defendant in a former trial testing his sanity in the County Court, wherein the defendant was adjudged insane, and defendant was several months thereafter placed on trial for murder, and said witness was then dead, it was error to exclude said expert's testimony in said County Court which was offered in behalf of defendant; the facts on which the hypothetical questions to said expert were based being substantially the same on both trials. Following Smith v. State, 66 Texas Crim. Rep., 593, 148 S. W. Rep., 722.

Appeal from the District Court of McLennan. Tried below before the Hon. Richard I. Munroe.

Appeal from a conviction of murder in the second degree; penalty, forty years imprisonment in the penitentiary.

The opinion states the case.

Williams & Williams, for appellant.—On question that the judgment declaring defendant insane a few months before he was placed on trial for murder, and which reached over the time of the alleged offense, was a bar to the prosecution for murder: Lermo v. State, 68 S. W. Rep., 684; Hunt v. State, 33 Texas Crim. Rep., 252; Wisdom

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v. State, 61 S. W. Rep., 926; State v. Reed, 7 So. Rep., 132; Ex Parte Trader, 24 Texas Crim. App., 393; Elston v. Jasper, 45 Texas, 409; Herndon v. Vick, 45 S. W. Rep., 852; People v. Farrell, 31 Cal., 576; Soules v. Robinson, 62 N. E. Rep., 999; Wooten v. State, 51 Texas Crim. Rep., 428.

On question of non-expert testimony and opinion of witness: Wells v. State, 50 Texas Crim. Rep., 499; Burton v. State, 51 id, 196; Williams v. State, 37 id, 348; McLeod v. State, 31 id, 331; Jordan v. State, 141 S. W. Rep., 786; Webb v. State, 9 Texas Crim. App., 490; Thomas v. State, 40 Texas, 61.

On question of reproduction of expert testimony: Glass v. Beach, 5 Vermont, 172; Smith v. State, 66 Tex. Crim. Rep., 593; 148 S. W. Rep., 722; First National Bank v. Wirnbach's Exr., 106 Pa., 39; Hunt v. State, 33 Texas Crim. Rep., 252; Wisdom v. State, 61 S. W. Rep., 926; Reyes v. State, 38 So., 257.

On question of court's charge on insanity: Merritt v. State, 39 Texas Crim. Rep., 70; Heckman v. Adams, 50 Ohio, 305, and cases above cited.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—This conviction was for murder in the second degree, appellant being allotted a term of forty years in the penitentiary.

The homicide occurred on the 21st of July. The following September, or about two months after the homicide, appellant was regularly adjudged insane in the County Court and sent to the lunatic asylum. After remaining in the asylum for a considerable length of time he was either discharged or got out in some way, the record being silent in regard to the matter. He was subsequently placed upon his trial for the homicide. When the case was called for trial he filed a certified copy of the proceedings in the County Court adjudging him insane. The proceedings in the County Court were all in strict conformity to the provisions of the statute. The jury responded to these questions submitted by the court under the statute and found appellant insane, and that he had been insane for ten or twelve months. Upon these findings he was adjudged insane and sent to the asylum.

Appellant presents several propositions: first, that the judgment of the County Court adjudging him insane is a bar to the prosecution for the murder inasmuch as the verdict of the jury and judgment of said court covered the time and for ten or twelve months prior to the time of the adjudication, and the said court being one of competent jurisdiction, was authorized to determine that question, and, therefore, it was final and conclusive. Another proposition insisted upon is that should the judgment not be a bar to the prosecution for the homicide, it was presumptive or prima facie evidence of insanity,

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and should be so used on the trial of his case for homicide. Another proposition contended for was, that the court should have, before placing defendant on trial under the indictment for murder, impaneled a jury to determine the question as to whether he was at the time of the trial insane, to the end that if he was he should not be tried until his restoration to sanity so that he might be of service to his counsel in conducting the case, and further, in accord with the law, that no man who is insane shall be tried for his life or liberty while he is in that condition.

The first proposition is a serious one and fraught with much trouble. It is one to which we have given a great deal of attention, and it is not as clear as we wish it could be from adjudicated cases. The rule seems to be well settled, however, after the judgment of the court having inquisitorial jurisdiction, as in insanity cases, that the judgment is conclusive of the mental condition or status of the party at the time of its rendition, but presumptive or prima facie evidence of insanity as to the time covered by the finding of the mental status of the party prior to the adjudication. There are a great many authorities which have discussed this question. The rule seems to be fairly well settled, if not thoroughly, with reference to all overreached or over-reaching transactions, that is, those matters covered by the verdict of the jury or conclusion of the inquisition prior to the judgment and the mental condition at the time of the judgment, that the judgment is to be regarded as prima facie or presumptive evidence of insanity during the time covered by the verdict or finding of the inquisition. 22 Am. Dec., 655; 18 Am. Dec., 417; 34 Ohio St., 396; Greenl. on Ev., Secs. 550-556-356; 16 Am. & Eng. Ency. of Law, p. 606-607, and collated cases; 7 Ency. of Evidence, pp. 457-462-464-477. In the 16 American & English Ency. of Law, supra, it is stated: "In collateral proceedings a finding of lunacy upon an inquisition which has not been superseded is presumptive and not conclusive evidence of insanity, and when the record of inquisition is offered in evidence in another proceeding, its validity is not open to collateral attack." As authority in note 2 we find the above on page 606. Quite a number of English cases are cited in the note as well as United States and state cases, including Georgia, Kentucky, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Texas and Vermont. The same work at page 607 states this rule: "So also where a transaction is overreached by the finding of the jury in lunacy proceedings, the inquisition is presumptive but not conclusive evidence of insanity at the time of such transaction," citing in support of this a great number of cases in England and America. These are to be found in note 2 on page 607 of said work. They are too numerous to be cited in the opinion. It is stated in the note, among other things, as follows: "As to acts done by a lunatic before the issuing of the commission and which are overreached by the retrospective finding of the jury, the inquisition is only presumptive but

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not conclusive evidence of incapacity,'' citing L'Amoureuz v. Crosby, 2 Paige (N. Y.), 422; same case 22 Am. Dec., 655; Wheeler v. State, 34 Ohio St., 396; same case, 32 Am. Rep., 372; Lancaster County Nat. Bank v. Moore, 78 Pa. St., 407; same case, 21 Am. Rep., 24. So by a long line of cases it is held that in a criminal prosecution, if it is established that the accused was afflicted with general or permanent insanity prior to the alleged crime, it will be presumed that insanity continued to the time of the alleged offense, and unless such presumption is overcome by competent evidence, the accused is entitled to an acquittal. For cases see 4 Vol., Am. & Eng. Annotated Cases, p. 492. See also 24 Am. & Eng. Annotated Cases, p. 388. Those show a great number of cases.

The rule seems to be also well settled that where insanity is once shown to exist that it will presume to continue. It is also laid down that the verdict is conclusive that insanity exists at the time of the rendition of the verdict. This is in line with what has been above stated. See 10 Pleading & Practice, p. 1222, and notes. There are a great many cases throughout the Federal Union which might be cited in this connection, which sustain the proposition, first, where a judgment has been rendered or an inquisition has determined the fact that the party is insane, that that is conclusive at the time of the rendition of the verdict; second, that from that time forward the presumption is that insanity continues until it has been adjudicated otherwise; third, that at the rendition of the verdict and judgment all matters covered and overreached by it prior to the rendition of the judgment and ascertained by the verdict the same rule obtains, that is, that it is presumptive that insanity existed for the time covered by the verdict. Taking the above as correct, it would seem to be the law that at the time of the rendition of the verdict and judgment in the County Court determining that appellant was insane, it was conclusive of that matter at the time, and is presumptive evidence of insanity for the ten or twelve months prior to the rendition of the verdict included by the finding of the jury in the inquisition in the county court, and that it is also presumptive evidence that from the time of the verdict finding him insane, that insanity will continue subsequently. If these views are correct, and we believe they are, then the State was not concluded from the prosecution of the case by reason of the verdict of the jury in the County Court, but that that judgment would be presumptive or prima facie evidence of insanity both before and after its rendition. This being correct, it shifted the burden of proof from the defendant to the State, and the State was required to assume the burden of proof in order to show that appellant was sane at the time of the homicide. The general rule is that where insanity is set up in the trial of a case to avoid punishment for an act charged to be criminal, the presumption is that he is sane, and the burden of proof is on him to show by preponderance of evidence that he is insane. This is the rule in Texas, though not in all of the

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states. It seems to be a much mooted question, and a very serious one, whether the rule is correct or not under the authorities of the United States. But such has been the rule in Texas. The rule, however, in Texas is equally well settled that wherever insanity has been shown by a judgment of the County Court in an inquisition or of de lunatico inquirendo the presumption is that he is insane at the time set out or covered by the verdict of the jury if it overreaches and goes back in its finding as to the length of time the party has been insane, and it is equally the rule, that the presumption of insanity obtains from that time forward. The introduction of this evidence then would cast the burden upon the State to show that he was sane at the time of the homicide. This is so in all the cases in Texas so far as we are aware. The matter underwent a pretty thorough investigation by this court in Hunt v. State, 33 Texas Crim. Rep., 252. The opinion in that case was well considered and written by the late Presiding Judge Hurt of this court. That case, in substance, held that on a trial for murder the charge is correct, which in effect instructs the jury that where a judgment establishing insanity has been put in evidence, the burden is upon the State to prove beyond a reasonable doubt that insanity of which defendant was convicted was temporary, or prove that he had been cured of such insanity, otherwise insanity is presumed to have continued. This case was approved in Wisdom v. State, 42 Texas Crim. Rep., 79, and has been approved in quite a number of cases subsequent to the Wisdom case. See Wooten v. State, 51 Texas Crim. Rep., 428. We therefore hold, under the first question presented, that is, that the judgment of *the* County Court adjudging appellant insane is not a bar to the prosecution for murder as contended by appellant, but is presumptive evidence of insanity, and makes a prima facie case to be overcome by the State under the rules laid down.

This brings us to the second proposition, that is, if the judgment was not a bar to the prosecution for the homicide, that it was prima facie evidence of insanity at the time of its rendition and for the time covered by the verdict of the jury and judgment of the County Court. We hold this proposition to be sound and well taken. Growing out of the second proposition there are quite a number of questions raised and suggested in regard to the rulings of the trial court and charges given and refused. The court, among other things, instructed the jury that, in passing on the question of insanity at the time of the homicide, they should not be found by the verdict and judgment in the County Court which had been introduced before them in evidence finding him insane after the alleged shooting. The court also instructed the jury that the burden of proof was upon the defendant to establish the question of insanity, and that he must prove it at the very time of committing the act. Exception was reserved to these charges and special instructions asked to the contrary. Among other things, these requested instructions contained this: "You are further

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instructed that the burden of proof is therefore on the State to prove by a preponderance of the evidence and beyond a reasonable doubt that at the time of said act the defendant's mental condition was such that he did know the character of his act and its consequences and had sufficient will power to refrain therefrom." There are other special charges submitting the same question in different forms, all looking to the one general proposition, however, that where insanity is shown to have existed by reason of the verdict and judgment of the county court, that the burden is on the State, on the trial for homicide, to show the sanity of the accused. We deem it unnecessary to repeat these charges. They sufficiently state the general proposition. The opposing propositions are sharply presented by the court's charges and those asked by appellant, and refused by the court, that is, the court instructed the jury to disregard the County Court judgment, and required defendant to prove by a preponderance of evidence that he was insane at the time of the homicide, whereas appellant insisted the burden of proof under the verdict of the jury and judgment of the county court was on the State to show that he was sane. The question of lucid intervals seems not to have entered into the discussion in the court below. Under the authorities, however, the burden would be on the state to show the lucid intervals. We, therefore, hold in regard to the second proposition, that the court committed error in the charges given and in refusing the special requested instructions.

Another proposition contended for was, the court should have, before placing appellant on his trial for the homicide, impaneled a jury to determine the question, whether he, defendant, was at the time of the trial insane, to the end, if he was, he should not be tried until his final recovery, and so that he might be of service to his counsel in conducting the case, as well as in accord with the humane provisions of the law which provide that no man who is insane shall be tried for his life or liberty while in that condition. If upon another trial of the case this question is presented as required by law, a jury should be impaneled, and if appellant is found insane, the case should be continued until appellant's mind has resumed its normal condition. This seems to have been the rule in Texas since Guagando v. State, 41 Texas, 626.

Another bill of exception recites that while Phil Hobbs was on the stand, the witness having testified only to a casual acquaintance with the defendant prior to the date of the homicide, and not having testified to any act or incident calling his attention to the mental status of the defendant, and the witness did not claim to have had any occasion or opportunity to know or consider the mental status of the defandant, all of which is made to appear by the testimony of the witness in the statement of facts, which is referred to and made a part of the bill, the State's attorney, referring to the morning after the homicide when the witness testified that he was there for a short while in the jail and saw the defendant and saw his friends coming

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and going and conversing with him, propounded to the witness the following question: "Did the defendant say anything that morning (the morning after the homicide) that indicated to you that he did not know right from wrong?" Various objections were urged to this, which being overruled, the witness answered, "Not that I noticed, no sir." The bill is approved with the qualification that the witness told all that he knew about the conduct of defendant, and was cross-examined by the attorney for the defendant about all the conversations that took place the morning after the homicide, the time which he is being interrogated about, and after the witness had related the entire conduct of defendant the county attorney was then permitted to ask him whether or not he saw anything in the conversation or in the conduct of the defendant that indicated to him that he did not know right from wrong, and the attorneys for the defendant had ample opportunity, of which they availed themselves, to cross-examine the witness about the matter about which he testified.

Another bill recites that the witness, John Pool, had testified for the State that he was a bartender and had seen the defendant occasionally; that he had never had any special occasion to observe the defendant or consider anything about his mental condition, and was not an expert, and only knew defendant when he saw him, but not personally acquainted with him, and had had no dealing with him. This witness further testified that on the day preceding the homicide the defendant came into his place of business about six o'clock in the afternoon and took a drink and picked up a paper and began looking at it, and the witness left at that time. The county attorney then propounded this question to the witness: "State whether or not there was anything in his conduct at that time that indicated that he was a crazy man, and not able to distinguish the right from the wrong?" Objection was urged to this, and the witness finally answered, "I noticed no difference in him." A similar qualification by the judge was appended to this bill as to the former one.

Nat Harris, the assistant county attorney, testifying for the State, stated he was not an expert in any way on insanity. The bill further recites that the issue of insanity was raised by the testimony in the case, and there was testimony before the court and jury on both sides of the question. While this witness was on the stand testifying in behalf of the State, the county attorney propounded the following questions: "You say you were with Mr. Witty about an hour and a half after the killing? A. Yes, sir. Q. What, if anything, did he do while you were with him that indicated that he was a crazy person and did not know right from wrong?" Various objections were urged, which were overruled, and the witness answered, "He never did anything to indicate to me but what he was sane."

There are a number of these bills of exception, but those above are mentioned as samples showing the character of testimony which was introduced from non-expert witnesses. The objections were properly

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and timely urged, and should have been sustained. Under no rule or decision was this character of testimony admissible. These witnesses do not show themselves in position to know. Sufficient facts are not stated by the witnesses to show they knew enough of the traits and life and disposition and other matters pertaining to the defendant to place them in the attitude to know whether he was sane or insane, or whether he knew right from wrong, or to express any sort of intelligent conclusion. This question has been so often discussed we deem it unnecessary to review the question in the light of those decisions. It was clearly inadmissible, as shown by the record. This character of testimony is admissible provided a sufficient basis or predicate is first established. See Jordan v. State, 141 S. W. Rep., 790.

Another bill recites that Dr. Wallace had testified in the trial for lunacy in the County Court that he was an expert of wide reputation and of great experience, and since giving his testimony had died. The bill is a lengthy one, reciting the testimony of Dr. Wallace taken down by the stenographer in the County Court on the trial of appellant for insanity. As before stated, Dr. Wallace is shown by the bill to have been an expert on insanity, and for years superintended one of the lunatic asylums of the State of Texas, and was a physician and alienist of wide experience and varied information and knowledge. Then follows quite a lengthy stenographic report of the evidence of Dr. Wallace. This evidence was excluded when it should have been admitted if the facts on which the hypothetical questions were based are substantially the same on this trial as on the trial for insanity. The issue in the County court was the sanity or insanity of the appellant. The testimony of Dr. Wallace was given on that trial. The identical issue as to his sanity covering the time of the homicide was an issue in this case. It is not necessary here to discuss the constitutional question of confronting the accused with the witnesses against him, for it is not raised. Dr. Wallace's evidence was offered here in his behalf. So it is unnecessary to notice any constitutional question. Under the authorities this testimony was, we think, admissible. A kindred question was passed on by this court in the recent case of Smith v. State, 66 Texas Crim. Rep., 593, 148 S. W. Rep., 722, from the same county. It is unnecessary to review this question. This testimony was admissible.

There are other questions in the case in regard to the introduction and rejection of testimony. The court will be governed by the rules already announced in these matters if the questions should arise upon another trial.

For the reasons indicated the judgment is reversed and the cause is remanded.

Reversed and remanded.

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Thomas Sanchez v. State.

No. 2292. Decided February 19, 1913.

1.—Murder—Evidence—Reproduction of Testimony—Predicate.

Where, upon trial of murder, there was a sufficient predicate laid to admit the testimony given on a former trial by a State's witness who had left the State, there was no error. Following Robertson v. State, 63 Texas Crim. Rep., 216.

2.—Same—Charge of Court—Reasonable Doubt.

Where, upon trial of murder, the court's definition of reasonable doubt was in accordance with Article 765, Code Criminal Procedure, without further amplification or explanation, the same was sufficient and proper practice. Following Thompson v. State, 37 Texas Crim. Rep., 227, and other cases.

3.—Same—Charge of Court—Manslaughter.

Where, upon trial of murder, the evidence did not raise the issue of manslaughter, there was no error in the court's failure to charge thereon.

4.—Same—Requested Charges.

Where one requested charge was not applicable to the facts and the other embraced in the court's main charge, there was no error in refusing them.

5.—Same—Evidence—Size—Age.

Where the issue was material, there was no error in admitting testimony as to the relative size and age of the parties.

6.—Same—Sufficiency of the Evidence.

Where, upon trial of murder, a conviction of murder in the first degree was sustained by the evidence under a proper charge of the court, there was no error.

Appeal from the District Court of Goliad. Tried below before the Hon. John M. Green.

Appeal from a conviction of murder in the first degree; penalty, death.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.—On question of laying predicate for reproduction of testimony: Scruggs v. State, 35 Texas Crim. Rep., 622; Hughes v. State, recently decided.

HARPER, Judge.—Appellant was prosecuted for and convicted of murder in the first degree, and his punishment assessed at death. This is the second appeal in this case, the opinion on the former appeal being reported in 67 Texas Crim. Rep., 453, 149, S. W. Rep., 124. The facts are so fully stated in the former opinion, we do not deem it necessary to recite any of the testimony.

The first bill of exceptions shows that the testimony of Cyrus Parks, given on the former trial was reproduced, to which defendant objected on two grounds, first, that no sufficient predicate was laid

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and, second, on the ground that defendant was entitled to be confronted with the witnesses agaist him. This latter proposition was so fully discussed in Robertson v. State, 63 Tex. Crim. Rep., 216, 142 S. W. Rep., 533, we do not deem it necessary to do so again. As to the first objection, the absent witness' father testified: "I know Cyrus Parks; he is my son and is 37 years old. He is not in Texas; he is in Central America. We have a letter from him and he wrote us what he was doing in Central America. He is employed down there." This was a sufficient predicate to admit the testimony. Whorton v. State, 152 S. W. Rep., 1082.

The court gave the following charge on reasonable doubt; "The defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and in case you have a reasonable doubt as to defendant's guilt, you will acquit him and say by your verdict 'not guilty.'" This definition is in accordance with Article 765 of the Code of Criminal Procedure, and it has always been held that this charge needs no amplification or explanation. (Thompson v. State, 37 Texas Crim. Rep., 227; Hurley v. State, 35 Texas Crim. Rep., 382.) The court did not err in refusing the special charge seeking to have a difinition of "reasonable doubt" given.

As shown by the testimony copied in the opinion on the former appeal, the issue of manslaughter was not raised by the testimony, therefore, the court did not err in refusing the special charge relating to manslaughter, the evidence on this trial being the same in substance as that adduced on the former trial.

The fifth special charge was not applicable to the facts in this case, and the other special charges requested were, insofar as they presented the law, given in the court's main charge.

There was no error in the court permitting witnesses to testify as to the relative size of appellant and deceased and their respective ages. The testimony, as a whole, made this a material issue.

The evidence fully sustains the verdict, and every issue made by the testimony was fairly submitted to the jury in the court's charge.

The judgment is affirmed.

Affirmed.

W. L. FLETCHER V. STATE.

No. 2293. Decided February 19, 1913.

1.—Aggravated Assault—Continuance—Want of Diligence.

Where defendant knew that the absent witnesses were not in the county of the prosecution at the time process was issued, this will not be diligence, although such absence may have been temporary; besides, the absent testimony was of an impeaching character, and the application also showed that one of the witnesses was absent by the consent of the defendant, and there being no abuse of discretion shown in overruling the motion for continuance, there was no error.

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2.—Same—Discretion of Court—First Application.

Even the first application for continuance need not be granted as a matter of right, but is addressed to the sound discretion of the trial judge, and where such discretion is not abused, there was no error.

3.—Same—Evidence—Bill of Exceptions.

Where the bill of exceptions failed to show what answer the defendant had reason to believe the witness would have given, the same could not be considered on appeal. Following May v. State, 25 Texas Crim. App., 114, and other cases.

4.—Same—Misconduct of Jury.

Where, upon trial of aggravated assault, the alleged misconduct of the jury was not of such character as to have injured the rights of defendant under the facts and the charge of the court, there was no reversible error.

Appeal from the County Court of Collingsworth. Tried below before the Hon. R. H. Cocke.

Appeal from a conviction of aggravated assault; penalty, a fine of $500.

The opinion states the case.

R. H. Templeton, for appellant.— On question of refusing continuance, Harrington v. State, 31 Texas Crim. Rep., 577; Murry v. State, 1 Texas Crim. App., 174; Fowler v. State, 25 Texas Crim. App., 27.

C. E. Lane, Assistant Attorney- General, for the State.

HARPER, JUDGE.—Appellant was prosecuted and convicted of an aggravated assault, and his punishment assessed at a fine of $500.

That appellant entered the bed room occupied by Mrs. Eva Snodgrass, undressed, in the night-time, is proven beyond dispute, he and Mrs. Snodgrass both testifying to that fact. He says he went by her solicitation, and that he did not act without her consent. She testified that he entered the room without her knowledge or consent and approached the bed on which she was sleeping, and placed his hands on her person, which aroused her, when she called to others. It also appears that Mrs. Snodgrass' brother at once filed a complaint, not waiting until morning.

When the case was called for trial, appellant moved to continue the case on account of the absence of five witnesses, Lester Fields, O. M. Gould, Geo. Brocius, Mrs. Rodgers, and Mrs. Mose Richardson. Appellant was arrested on the 1st day of August, and did not have process issued for any witness until the 24th day of August, 1912, returnable on the 2nd day of September. Only one of the above named witnesses was summoned, Lester Fields.

The State filed a contest of the application, and showed by the testimony of L. A. Hunt and D. B. Jones that they heard a conversation between appellant and the witness, Lester Fields, and they heard appellant tell said witness "that he (appellant) would not

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need him (Fields) as a witness, and he could go where he pleased." That after this conversation Fields did leave. As to the witnesses, Mrs. Ralph Rodgers, George Brocius and O. M. Gould, the State introduced the testimony of J. F. Albright, L. A. Hunt, D. B. Jones and E. V. Smith, that none of these witnesses were in Collingsworth County at the time the subpoena was issued by appellant, and that appellant knew this fact. If appellant knew the witnesses were not in the county at the time the process was issued, this would not be diligence. The process should have been directed to the county where they then were, even though the absence may have been temporary. As to the witness, Mrs. Mose Richardson, the facts stated it is expected to prove by her would only tend to impeach the testimony of Mrs. E. V. Smith, a witness for the State. A continuance will not be granted to secure impeaching testimony. (Garrett v. State, 37 Texas Crim. Rep., 198; Rodgers v. State, 36 Texas Crim. Rep., 563; Butts v. State, 35 Texas Crim. Rep., 364; Franklin v. State, 34 Texas Crim. Rep., 203.) A continuance, even the first, is no longer a matter of right, but is addressed to the sound discretion of the trial judge, and under the evidence adduced on the hearing of this motion, we cannot say that the court abused his discretion in overruling the motion.

The only other ground in the record relates to a question propounded to the main prosecuting witness, Mrs. Eva Snodgrass, which the bill states was objected to by State's counsel. While the bill shows that the jury was retired, and the matter heard by the court, when the objection was sustained, yet it does not disclose what answer the witness made, if any, or what answer he had reason to believe she would have given, if she had answered the question. Under these circumstances there is nothing for us to review. May v. State, 25 Texas Crim. App., 114; Schoenfeldt v. State, 30 Texas Crim. App., 695.

This being a misdemeanor, the other questions sought to be raised in the motion for new trial cannot be considered, except the one relating to the alleged misconduct of the jury. The only misconduct alleged is that the jury, while considering the case, discussed the fact that appellant was a professional man, and "was a good party to make an example of." That he was a professional man was a fact proven in the case, therefore legitimate to be discussed; but as to him being a good party to make an example of, this does not show that passion or prejudice, which alone would authorize a new trial. It seems that the entire jury was of the opinion that appellant was guilty, and this arose over the question of the punishment to be inflicted for the offense, and if the State's theory of the case is correct, the punishment assessed is none too severe. It is true that appellant would show that his acts and conduct, if his testimony is given credence, were under the belief that his approaches would be acceptable. However, when charged with being in the lady's

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room that night, he first denied being by her bed, and then said he might have gotten too near her bed while he was asleep; and then added he was mean and could not help it. He does not deny offering to pay her to hush the matter up. As the court instructed the jury that even though the defendant was guilty of undue familiarity with the person of Mrs. Snodgrass, yet if he did so by her invitation or had reasonable grounds to believe and did believe that same would not be objected to, to acquit him, and the jury find contrary to his contention, we do not feel authorized to disturb the verdict.

The judgment is affirmed.

Affirmed.

CHARLES BROWN V. STATE.

No. 2291. Decided February 19, 1913.

Rehearing Denied March 19, 1913.

1.—Adultery—Motion for New Trial—Jurisdiction.

Where, upon appeal from a conviction of adultery, the record showed that the court below permitted defendant to execute a temporary appeal recognizance and thereupon allowed him within two days after trial to file his motion for new trial, which was then overruled, notice of appeal given and a new recognizance entered into, this court's jurisdiction did not attach by reason of the first recognizance.

2.—Same—Sufficiency of the Evidence—Circumstantial Evidence.

Where, upon trial of unlawfully living together in adultery, the evidence showed that both parties were married at the time to other parties and that they lived together practically as man and wife, and the evidence further circumstantially showed that they had sexual intercourse while thus living together, the conviction was sustained.

3.—Same—Charge of Court—Requested Charges.

Where, upon trial of adultery, the requested charges which were refused were substantially covered by the court's main charge, there was no error.

4.—Same—Evidence—Shorthand Facts—Bill of Exceptions.

Where, upon trial of adultery, a State's witness was permitted to testify that defendant lived together with his paramour, this was a shorthand rendition of the facts, and not a conclusion of the witness, and therefore admissible; besides, the bill of exceptions was defective. Following Conger v. State, 63 Texas Crim. Rep., 312.

5.—Same—Leading Question—Bill of Exceptions.

Where, upon trial of adultery, the question asked by the State's counsel how long defendant and his paramour lived together was not leading, there was no error; besides, the bill of exceptions was defective. Following Carter v. State, 59 Texas Crim. Rep., 73.

6.—Same—Evidence—Bill of Exceptions.

Where, upon trial of adultery, the evidence showed that the defendant and his paramour lived together for some time, there was no error in admitting testimony that delivery wagons carried groceries to the house where they lived together and that defendant told a State's witness that his paramour was a married woman at the time, etc.; besides, the bill of exceptions was defective and all this testimony was brought out by defendant.

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7.—Same—Evidence—Practice on Appeal.

It is too late to raise objections to the admission of testimony for the first time in the motion for new trial; besides, the testimony that defendant's paramour was a prostitute was admissible.

8.—Same—Indictment—Different Counts.

There was no error in overruling defendant's motion in arrest of judgment because of the two counts in the indictment under which the cause was submitted. Following Cabiness v. State, 66 Texas Crim. Rep., 409.

Appeal from the County Court of Limestone. Tried below before the Hon. W. A. Keeling.

Appeal from a conviction of adultery; penalty, a fine of $1,000. The opinion states the case.

Doyle & Jackson and *R. B. Molloy* and *R. S. Neblett* and *R. R. Owen,* for appellant.—On question of insufficiency of the evidence as to the question of marriage Burford v. State, 68 Tex. Crim. Rep., 151 S. W. Rep., 538; Wiley v. State, 33 Tex. Crim. Rep., 406.

On the question of living together of parties: Thomas v. State, 12 S. W. Rep., 1098; Ledbetter v. State, 17 S. W. Rep., 427.

On question of sexual intercourse: Kahn v. State, 38 S. W. Rep., 989; Brawshaw v. State, 61 S. W. Rep., 713; Manuel v. State, 74 S. W. Rep., 30.

On question of admitting evidence of living together: McClackey v. State, 5 Texas Crim. App., 329; Campbell v. State, 30 id, 645.

C. E. Lane, Assistant Attorney-General, for the State.—On question of defendant's marriage: Coons v. State, 49 Texas Crim. Rep., 256.

On question of sexual intercourse by circumstantial evidence: Counts v. State, 49 Texas Crim. Rep., 329.

PRENDERGAST, JUDGE.—From a conviction for adultery with a fine of a thousand dollars, appellant appeals.

The complaint and information are in three counts. The first charges that appellant, a man, and Olivia Coleman, a woman, on or about May 25, 1912, unlawfully lived together and had carnal intercourse with each other, he being then lawfully married to another person then living. The second count charges exactly the same thing, except that instead of charging that he was lawfully married to another, it charged that the woman was. The third count, which was not submitted to the jury, charged fornication.

The Assistant Attorney-General, by motion, seeks to strike from the record the motion for new trial filed within two days after the trial and all subsequent proceedings of the court below, on the ground that on the day the case was tried appellant appealed and then entered into a proper appeal recognizance. We have carefully examined the record, and while it shows that on the day of the conviction and after

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the conclusion of the trial, in order to prevent the appellant from then going to jail, the court permitted him to execute said appeal recognizance. But this was agreed at the time to be only temporary to secure his return two days later when his motion for new trial would be made and then acted upon and if overruled, a new recognizance would be entered into. He did return two days later, his motion for new trial was then filed, acted upon and overruled, and he then, for the first time, gave notice of appeal and then entered into a new recognizance, the court setting aside by express order the previous recognizance. All this clearly shows that the jurisdiction of this court did not attach on the execution of said first recognizance. No notice of appeal was then given and no notice of appeal was given until after the overruling of the motion for new trial at which time he gave said second recognizance. The motion of the Assistant Attorney-General is, therefore, overruled.

The appellant introduced no evidence. The evidence by the State was uncontradicted. It is unnecessary to give the testimony in full. We will merely give a summary of it and substantially quote in some particulars the testimony of some of the witnesses.

Wm. Jeffries testified that he was then, and for several years before had been, deputy sheriff of Navarro County, Texas, and had known appellant all his life. He said: "Some time in February or March, 1912, the defendant came to me at Corsicana, Texas, and told me that a woman by the name of Olivia Coleman was in a bawdy house in that city, and that he, the defendant, was well acquainted with her father who lived at Kirven in Freestone County and that he, Brown, desired to get her out of the whorehouse and carry her back to her father's house and wanted me to go to the whorehouse and use my best efforts to persuade the Coleman woman to leave the whorehouse and go with Brown to her father's house. The defendant also told me that Olivia Coleman was a married woman whose husband lived at or near Kirven in Freestone County, and that a doctor had carried Olivia Coleman from Kirven and placed her in the house of prostitution. This house was run by a woman named Miss Frankie. I told the defendant that I would go with him and did go with him to the house where Olivia Coleman was staying. We went in the house and I called for Olivia Coleman. The defendant did not seem to know her as she was introduced to Brown. The defendant and I told Miss Frankie the purpose of our mission. The defendant and Olivia Coleman left the parlor and went upstairs together. They remained there about one hour and came down. At Brown's request I went to see the woman two or three times for the purpose, as I thought, to persuade her to go with the defendant to her father's or sister's home."

On cross-examination this witness showed that appellant owned a large farm in Navarro County and another in Freestone County; that he had a home or house on his Navarro County farm and had

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lived there for years; that a widow named Mrs. Lowe with several children had lived with him and kept house for him. He said: "I knew Mr. Brown's first wife; she was divorced from him. A few years ago he married again in Freestone County. I do not know what has become of his last wife. I do not know whether she has ever been divorced from him or not. I do not know where she lives. No, sir, I do not know it to be a fact that his present wife is living in San Antonio, Texas; if I had known it I certainly would have said so. I do not know where Brown has been living during the last four or five months. He sometimes lives in Navarro County and he sometimes goes to Freestone County to his farm over there."

Miss Frankie testified: That she lived in Corsicana and was engaged in conducting a bawdy or sporting house there; that she knew Olivia Coleman and saw her at court on the day of the trial. She said: "Some time in February or March of the year 1912, Olivia Coleman came to my house and wanted to stay with me. She did not go by the name of Olivia Coleman when she was in my house. I rented her a room and she stayed in my house a week and three or four days. When she came there she had no money. She was a sporting or lewd woman, but made very little money while at my house." She then showed that she knew appellant and testified substantially as Mr. Jeffries did about his and appellant's going to her house to see Olivia Coleman. She said: "The defendant wanted to talk with her. They left the parlor together and went upstairs to Olivia Coleman's room and stayed there for an hour or an hour and a half. Mr. Brown visited Olivia at my house three or four times during her stay at my house. Whenever the defendant came he and Olivia Coleman would go upstairs to Olivia's room. They would usually stay from an hour to two hours in the room. Of course, I do not know what happened in the room when they were there. I am not in the habit of spying around when any of my girls go to their rooms with men."

On cross-examination this witness said: "I went upstairs once or twice while the defendant and Olivia Coleman were in the room together, the door was open. I do not know what they had been doing before I went upstairs and do not know what they did after I left." She further testified that appellant, when he came there with Mr. Jeffries on his first trip, told her that he wanted to get Olivia Coleman out of the house of prostitution for the purpose of taking her back to her father's house in Freestone County; that her father was a personal friends of his and he wanted her to go back to her father's house or her sister's who lived at Teague in Freestone County; that she never heard Brown say anything to Olivia Coleman at any time; that he never talked with her, in her (witness') presence.

Mr. T. J. Griffith testified that he lived in Mexia, Texas, and that appellant and said Coleman woman lived on the same block where his residence was located; only an alley was between them. He said:

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"Brown and Mrs. Olivia Coleman lived together at this house (the house they lived in) for about three months. I have seen them there together dozens of times. Brown had a horse and buggy and I frequently have seen him come in at nights and feed his horse there at the house. He was frequently away from the house in the daytime. I have seen the defendant and Olivia Coleman together there in the yard on many occasions, and have frequently seen them leave the yard and go in the house together. I have seen the Coleman woman frequently carrying stove wood into the house and I have seen the smoke coming out of the stove flue, and I have seen her washing there at the house and I have seen the wash clothes hanging on the line; I never saw any men's clothes in wash, but I paid no attention to that. I have seen Brown leave the house on several occasions in the morning, hitch his horse tc the buggy and drive away. No one stayed at this house, except the defendant, Brown, and the Coleman woman, except a small boy, who looked to be about 8 or 9 years old."

On cross-examination he testified: "The defendant and this woman lived there at least two or three months. I can not and will not attempt to say the exact number of times I have seen the defendant at the house. I regarded them as married people and paid very little attention to them." Then he testified that he never saw any acts of intimacy between them and was never in the house while they lived there and knew nothing of the furnishing of the house. He did not at any time see them in bed together and he never saw him hug or kiss her. He did not know how many beds there were in the house.

Hugh Everett testified that he lived at Mexia in Limestone County and knew appellant and said Olivia Coleman. He said: "Some time last February the defendant occupied a house near my residence in the town of Mexia, Texas, in Limestone County. The defendant stayed at the house one week before the woman Olivia Coleman came there to live. The defendant and the Coleman woman lived in the house for two or three months. The defendant kept a horse and buggy and frequently at night he would come to the house, unhitch his horse and feed it, and would go into the house. * * * I have seen the defendant and the woman, Mrs. Coleman, frequently talking in the yard where the house is located. I have seen both of them go into the house at night, and have seen the defendant come out in the morning. The house where the defendant lived was just across the street from my residence. * * * I saw the defendant, Brown, and the woman, Mrs. Coleman, around the place there several times a week and during the time they lived there which was about three months."

On cross-examination this witness said he was never in the house while these parties lived there; that he never knew them before then and that he never saw anybody at the house during the time they stayed there, except a little boy 8 or 9 years old; that the woman re-

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mained at the house about one week after appellant was arrested and she then left and he did not know where she went; that she stayed there all the time from the time she first came until she left after Brown was arrested.

We have carefully gone over and considered the whole record in this case and appellant's brief and all of his authorities cited. It is unnecessary to take up and discuss all of appellant's claimed errors. The correct disposition of the case does not require this. It depends upon the decision of but few of appellant's contentions. He claims the evidence was insufficient to sustain the verdict, among others, because it is insufficient to show the marriage and the then living of either the appellant's wife, or Olivia Coleman's husband, and that it is insufficient to show that they lived together at this house at the time charged, in contemplation of our statute, and that it is insufficient to establish that they had sexual intercourse while staying at this house.

It is unnecessary to discuss either or all of these several contentions of appellant. In our opinion the evidence is sufficient for the jury to have believed and found that appellant was a married man, and that his wife was then living; that said woman was a married woman and her husband was then living; that they lived together practically as man and wife at this house for three months continuously, as shown by said testimony; that they had sexual intercourse while thus living together, can be established by circumstantial as well as direct testimony. In fact, practically that is the only way sexual intercourse can usually be shown. The act of sexual intercourse between man and woman, in all instances, is indulged in as secret and private way as it can be. Both parties always attempt to conceal it and do all things necessary and proper for preventing others from even suspecting such an act. The evidence clearly and without contradiction shows that this woman was a common prostitute; that appellant learned she was in a whorehouse in Corsicana; that he went there, claiming that he wanted to get her away from that house and take her to her father's or sister's; that she was only in this whorehouse about ten days. He went to see her there repeatedly, but never saw her in the presence of any other. He always took her to her private room and stayed there with her from one to two hours. He succeeded in getting her to leave the whorehouse but did not take her to her father's or sister's. If so, he did not induce her to stay with either of them, but went to another town, got a house and had her to come there and live with him continuously until after he was arrested. No other conclusion could be drawn from the testimony than that he lived with her in adultery in this house in Mexia, for the whole length of time she stayed there until his arrest, and that she left about a week after he was arrested.

We have carefully considered all of appellant's special charges which were refused by the court and in our opinion, wherever neces-

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sary or proper to have been given, they were substantially and fully covered and given by the court's charge.

By one of appellant's bills it is shown that while the State's witnesses, Everett and Griffith, were testifying for the State they were each permitted, over his objections, to testify this: "That the defendant, Charles Brown, and Olivia Coleman lived together in the town of Mexia for three months or thereabouts." His objection was that it was a conclusion of the witness, that each witness ought to have stated the facts and let the jury determine whether they lived together or not. The bill further states that said evidence was in response to a leading question which was: "How long did defendant and Mrs. Olivia Coleman live together in Mexia?" That the court overruled these objections and permitted the question and answer to be given. This is in substance the whole of bill. It in no way gives the status of the case or the other testimony, or anything else about the matter other than what is substantially stated above. This bill, under the long established and uniform holding of this court is insufficient to require this court to consider it. Conger v. State, 63 Texas Crim. Rep., 312 and authorities there cited. Clearly the question objected to as leading, does not show reversible error. Carter v. State, 59 Texas Crim. Rep., 73. Notwithstanding we are not required to pass on this bill as it is, yet we do so, and in our opinion this testimony of these witnesses was admissible. If we could go to the record we would see that the facts were detailed by the witnesses which showed that these parties lived together at this house. And stating, as they did, as shown by this bill, was a mere short-hand rendition of the facts. 1 Whart. Crim. Ev., Sec. 458. As said by the court in State v. Brundidge, 118 Iowa, 92: "While the answer called for is in some sense a conclusion, it is one of those conclusions which so far partake of the nature of fact as to be admissible in evidence. To hold such evidence incompetent would limit and hamper the introduction of evidence in a manner not contemplated by any rule of law of which we have any knowledge." See also Subdivision 2, Sec. 1093½, White's C. C. P., p. 704.

The bill objecting to these witnesses stating that they had seen delivery wagons carry groceries to the house Olivia Coleman lived in is likewise insufficient, yet it is our opinion that this testimony, even if improperly admitted, would not constitute reversible error and could not and did not affect the verdict of the jury. What we have said as to these bills, equally applies to another, wherein it is claimed that the witness Jeffries was permitted to state that the defendant told him that Olivia Coleman was a married woman, whose husband lived at or near Kirven in Freestone County, yet, if we could consider the bill, in our opinion, this evidence was pertinent and clearly admissible. The same thing applies to another of appellant's bills complaining that the witness Jeffries was permitted to tell that Mrs. Lowe, the house-keeper of appellant, married a man by the name of

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Jackson a few years ago; that they lived together only a short time when they separated and she returned to keeping house for appellant. Besides, this was a mere crossing of appellant's witness, who had substantially brought out the facts about Mrs. Lowe and no material error is shown in the admission of that testimony.

The testimony by Griffith and Miss Frankie that said woman, Olivia Coleman, was a prostitute and had been in a house of prostitution at Corsicana and what occurred with appellant there about her in that connection, was in no way objected to at the time the evidence was introduced. Its admission is complained of for the first time in the motion for new trial. It is too late to raise such questions for the first time by motion for new trial. They must be raised by bill of exception. Besides, in our opinion, the evidence was clearly admissible.

Appellant's motion in arrest of judgment, because of the two counts in the indictment under which this cause was submitted, presents no error. It was proper to charge as was done in this complaint and information. Cabiness v. State, 66 Tex. Crim. Rep., 409, 146 S. W. Rep., 934, and authorities therein cited.

We have carefully considered all the question raised in this case and in our opinion no reversible error whatever is pointed out. The judgment is, therefore, affirmed.

Affirmed.

[Rehearing denied March 19, 1913.—Reporter.]

OTIS BAGGETT V. STATE.

No. 2073. Decided November 27, 1912.

1.—Arson—Accomplice—Continuance.

Where defendant was tried as an accomplice for arson, and the State claimed by the witness who burned the house that the defendant employed said witness to do the burning and the agreement was made at a certain time and place, and defendant's motion for continuance alleged that he expected to show by the absent witness that at said time and place the witness was present and that no such agreement was made between the parties, the continuance should have been granted.

2.—Charge of Court—Accomplice—Corroboration.

Where the State claimed that the defendant burned the alleged house by employing another to do so and the court submitted a general charge on the corroboration of accomplice's testimony, but failed to direct the attention of the jury to the fact that the corroboration should be as to whether defendant employed State's witness to burn the house, and a special charge submitting this issue was requested, the same should have been given.

3.—Same—Newly Discovered Evidence.

Where the judgment is reversed and the cause remanded upon other grounds, the question of newly discovered evidence need not be considered.

Appeal from the District Court of Johnson. Tried below before the Hon. O. L. Lockett.

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Appeal from a conviction as an accomplice to arson; penalty, five years imprisonment in the penitentiary.

The opinion states the case.

Odell & Johnson, for appellant.—On question of continuance: Sharp v. State, 61 Texas Crim. Rep., 247; Perez v. State, 48 id, 225; Kelly v. State, 33 id, 31; Hyden v. State, 31 id, 401; McAdams v. State, 24 id, 86.

On question of corroboration: Moore v. State, 58 Texas Crim. Rep., 183; Jackson v. State, 51 id, 220; Barton v. State, 49 id, 121; Dixon v. State, 15 Texas Crim. App., 480.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, Judge.—Appellant was prosecuted and convicted of the crime of being an accomplice to arson, and his punishment assessed at five years confinement in the penitentiary.

When this cause was called for trial on June 5th defendant moved to continue the case on account of the absence of the witness, J. L. Harris, it being made to appeal that defendant was indicted on the 13th of May and arrested thereafter, and on 17th day of May he had a subpoena issued for the absent witness, but the sheriff had not succeeded in summoning him at the time of trial. Brock, the State's witness, admitted he burned the house, and says that defendant employed him to do so that he might collect his insurance on the stock in the house. He further says that this conversation took place in defendant's place of business about five minutes before the store was closed, and but a short time before the fire. Defendant, in his application for a continuance, says that Harris will testify that he (Harris) was in defendant's place of business for about forty-five minutes before the store was closed, and was there when Brock came in. That he heard all the conversation that took place between Brock and appellant, and no such conversation took place as Brock details. That he (Harris) remained until the store was closed, and went with defendant to a Christmas tree, where they were when the fire occurred. Thus it is seen that this testimony, if the witness Harris would so swear, is very material, for the allegation is that he will swear that he was present when Brock came to the store and remained there until the store closed. Brock, of course, testifies Harris was not in the store when the trade was made with him to burn the building, but he says the trade was made only about five minutes before the store closed, while it is stated Harris will testify that he was at the store for forty-five minutes before it closed, and was there when Brock came and left. It is upon this employment of Brock upon which it is sought to convict appellant as an accomplice of Brock. Their testimony would be in direct conflict, and if Harris so testified and the jury believed him, it would necessarily follow that defendant would be acquitted. The alleged testimony is

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so material we think the court erred in overruling the application and in not granting a new trial.

The court charged the jury as to accomplice testimony and the necessity for corroboration in a form frequently approved by this court, but as it is not contended that appellant aided in burning the house, or was present when it was burned, appellant insists that a more direct application of the law than a general charge should have been given, directing the attention of the jury to the fact that the corroboration should be as to whether defendant employed Brock to burn the house. The State offered evidence corroborative of the testimony that he, Brock, burned the house, and appellant insists that under this general charge the jury was misled, and complains because the court failed to give his special charge, which reads: "You are instructed that by corroboration as used in the general charge, is meant that the evidence must connect the defendant with the procuring and hiring of Dick Brock to burn the building alleged in the indictment. It is not sufficient if it merely shows that Dick Brock burned the building." Where a special charge is requested, directing the attention of the jury to the real issue in the case, it should be given, if the charge of the court does not aptly do so.

We do not deem it necessary to discuss the alleged newly discovered testimony, as it will not be newly discovered on another trail, nor is it necessary to discuss the other questions raised.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

JIM SCOTT V. STATE.

No. 2078. Decided November 27, 1912.

Local Option—Sale—Insufficiency of the Evidence.

Where, upon trial of a violation of the local option law, the evidence was not sufficient to establish a sale, the conviction could not be sustained. Harper, Judge, and Prendergast, Judge, agreeing to reversal upon another ground.

Appeal from the County Court of Red River. Tried below before the Hon. George Morrison.

Appeal from a conviction of a violation of the local option law; penalty, a fine of $25 and twenty days confinement in the county jail.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was convicted of violating the local option law, his punishment being assessed at a fine of $25 and twenty days imprisonment in the county jail.

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The evidence for the State discloses through the witness Baker about as follows: On the morning of February 20, 1911, appellant approached the witness where he was working in the store for George McCulloch in Clarksville, Texas, and asked witness to let him have 50 cents. Witness replied, "What would that be to me?" and appellant answered, "Well, let me have the 50 cents," to which witness again replied, "What would that be to me?" Appellant then replied that he was going to get some whisky and that he would let witness have some of it for the 50 cents. Witness then let appellant have the 50 cents; appellant took it and went away, and later during the day —about 12 o'clock, noon—appellant came back with a quart bottle half full of alcohol. Witness examined it and knew it was alcohol. Witness then told appellant that he wanted whisky; appellant told the witness he had no whisky; that alcohol was all he had and that witness could have it if he wanted it. Witness asked appellant for his 50 cents. Appellant replied that he did not have 50 cents, but that witness could have the alcohol in place of the 50 cents if he wanted it. Witness then told appellant to go ahead, and that he would see appellant later. Appellant then went off down the street and into a negro pool hall. Witness further testified that he saw those negroes were going to get all of defendant's alcohol, and that he, witness, would get nothing for his 50 cents; that he immediately followed appellant and found him in a little store in the rear of the negro pool hall, in company with some other negroes; that he walked up to defendant and took the bottle of alcohol out of defendant's pocket; that the defendant made no resistance, but stood still and grinned; that one of the negroes, Arnett Jones, grabbed for the alcohol and tried to take it away from witness, and witness and Jones had a scuffle over the alcohol, but witness finally got away with it and carried it to Mr. McCulloch's barn, and during the evening and night witness drank all of it. On cross-examination he stated the facts above are true; that there was no understanding between witness and defendant that the defendant should bring him back any particular quantity of whisky; that defendant had never paid witness back the 50 cents; that witness did not expect him to do so. The State next introduced Bud Totten, who testified that he did no see Henry Baker get any liquor from the defendant, and knew nothing about the transaction. The State here closed its case, except to prove that local option was in effect. Arnett Jones was then introduced by the defendant, who stated that on the morning of February 20, 1911, that he was in the negro pool hall at Clarksville, in company with some other negroes, and that this negro, the defendant, came in and gave witness Arnett a pint bottle full of alcohol, and that witness and the other negroes drank it; that there were present besides himself Ben Johnson, Babe Johnson, and the defendant. That while they were all in the pool hall the negro, Henry Baker, ran in from the front of the house and grabbed a quart bottle which was

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about half full of alcohol out of defendant's pocket; that he, witness, also grabbed at it, but Baker's hold on the bottle was the best and he got away with it and ran out of the back door, and witness did not see any more of Baker that day. That he heard nothing said about any sale of liquor by the witness Baker and the defendant, and that he saw no money pass between them. Ben and Babe Johnson testified as did Arnett Jones except Ben Johnson testified in addition that defendant made a grab for the bottle of alcohol while Jones and Baker were scuffling over it. Appellant took the stand in his own behalf and testified that it was not true that on February 20, 1911, the date set out in the information and stated by Baker, that he got 50 cents from Baker and told him that later on in the day he would bring him back some whisky for it; that Baker's whole testimony in this respect is false; that on the day mentioned he was in the pool hall with Arnett Jones, Ben Johnson and Babe Johnson and that he had a quart bottle about one-half full of alcohol in his overcoat pocket, and while he was in there Henry Baker ran in from the front door and back to where he and the other negroes were standing, and grabbing the alcohol out of his pocket, and at about the same time Arnett Jones grabbed at it and that he, defendant, also grabbed at it, and that there was a short scuffle over it; but Henry Baker's hold on it was the best and he got away with it and ran out of the back door. He also testified that about six o'clock that afternoon while defendant was going to the passenger train to meet his boss, who was coming in on the train, Baker stepped out and went to a trash barrel in front of Mr. McCulloch's store and got the bottle of alcohol out of the trash barrel, where it was hidden, and returned it to him and said, "Here is your alcohol; I have kept it for you to keep them niggers from drinking it all up from you." It was still in the bottle and looked like none of it "had been drunk up." That if any of it had been taken from the bottle from the time Baker got away from him, defendant, until he returned it, it was very little. He further testified that he did not sell any alcohol to Henry Baker or to anyone else, and that he had never at any time sold any liquor to anyone and that this is the first time he had ever been accused of so doing.

While there are some very decided contradictions in the testimony, we may take the State's evidence to the exclusion of appellant's testimony, and we are of opinion that the State has not proved a sale. Baker's testimony excludes such transaction. Take it in its strongest light, he let appellant have 50 cents with the understanding he was to get that amount of whisky in return. Appellant brought him some alcohol which he declined to have, and appellant went away, taking the alcohol with him. That Baker subsequently went to the pool hall where the negroes were and took the alcohol out of appellent's pocket does not constitute a sale. Baker does not intimate that appellant let him have the alcohol on his visit to the pool hall,

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but the testimony expressly excludes that idea. Baker testifies that he had a scuffle with Jones over it, who tried to take it away from him, and it is also shown appellant tried to get it after Baker grabbed it and started away with it. This testimony excludes the idea of a sale.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

HARPER, JUDGE, and PRENDERGAST, JUDGE, agreeing to reversal upon another ground.—We agree to the reversal of this case but not on the ground on which it is placed. The question of whether or not the defendant consented to the taking of the alcohol should have been submitted to the jury, and on this issue charges Nos. 1 or 2 requested should have been given. Of course, if defendant did not consent to prosecuting witness taking the alcohol, it would not be a sale, but if after tendering it in payment of the 50 cents, and prosecuting witness refusing it, if prosecuting witness subsequently changed his mind, as he says he did, and decided to take the alcohol, and he did take it in payment of the 50 cents, with the knowledge and consent of defendant, it would be a sale, and I agree to the reversal of this case solely on the ground that this issue was not submitted, after the court was requested so to do.

WILSON YARBROUGH V. STATE.

No. 2082. Decided November 27, 1912.

1.—Theft—Circumstantial Evidence—Rule Stated.

In cases of circumstantial evidence, the rule is that each fact necessary to establish guilt must be proven, and the facts and circumstances must not only be consistent with guilt, but inconsistent with any other reasonable hypothesis than the guilt of the accused.

2.—Same—Case Stated—Insufficiency of the Evidence.

Where, upon trial of theft, the evidence did not show the finding of any of the stolen property and the case depended entirely on circumstances, it was necessary to show that defendant, and defendant alone, was in such juxtaposition to the property as that he and he alone could have stolen it, or positively to have shown that others who had equal opportunity to steal the property did not do so.

3.—Same—Circumstantial Evidence—Suspicions.

Suspicious circumstances alone are not sufficient upon which to base a conviction; the circumstances must unerringly point out the defendant as the guilty person when circumstantial evidence is relied upon. Following Hogan v. State, 13 Texas Crim. App., 319, and other cases.

Appeal from the District Court of Camp. Tried below before the Hon. R. W. Simpson.

Appeal from a conviction of theft; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

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King & Engledow, for appellant.—On question of circumstantial evidence: cases cited in opinion.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was prosecuted and convicted of theft, and his punishment assessed at two years confinement in the penitentiary.

There is but one serious question in the case—the sufficiency of the evidence. It is a case of circumstantial evidence and the rule of law is in that character of case, each fact necessary to establish guilt must be proven, and the facts and circumstances not only consistent with his guilt, but inconsistent with any other reasonable hypothesis. In this case the facts show that Will Thomas had his money stolen. He went into a tailor shop, pulled out his purse and laid it on the counter. He and his cousin and the proprietor went to the rear of the store. While in the rear department, appellant entered the store, passed by the counter on which the purse had been placed, and subsequently went out of the store. Another man also entered the store and passed the counter where the money had been laid down. All the witnesses describe this man as a stranger—no witness knowing his name, but the State's witnesses all place him in the store, as well as defendant. Thus an opportunity was offered for either appellant or the stranger to take the purse. When its loss was discovered both appellant and the stranger were searched, but the money and purse were not found, and had not been found when this case was tried. Appellant's cousin, who also had an opportunity to take the purse, was not searched, as he was not suspicioned. This cousin testified on the trial, and says he did not get the money; appellant also testified and swears he did not get the money. But the stranger who entered the store building is not located and does not testify. Applying the "rule of exclusion" does the evidence meet the requirement of the law? It is true appellant had ample opportunity to take the purse and money, but so did the stranger and the cousin of appellant. Many suspicious circumstances are also introduced in evidence, showing that apellant lied about his whereabouts from the time he entered the store until he was searched, but he was in no way connected with the money and the purse further than to show he had an opportunity to take it, as did the others. We think, to render sufficient the evidence in the absence of finding any stolen property, in a case depending entirely on circumstances, it would have been necessary to show that appellant, and appellant alone, was in such juxtaposition to the property as that he and he alone could have stolen it, or positively to have shown the others did not do so.

Suspicious circumstances alone are not sufficient upon which to base a conviction. The circumstances must unerringly point out the defendant as the guilty person, when circumstantial evidence is re-

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lied on. Brooks v. State, 56 Tex. Crim. Rep., 513, 120 S. W. Rep., 878; Johnson v. State, 52 Tex. Crim. Rep., 510, 107 S. W. Rep., 845; Green v. State, 59 Tex. Crim. Rep., 6, 127 S. W. Rep., 549; Hogan v. State, 13 Texas Crim. App., 319; sec. 206, Branch's Criminal Law.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

J. H. HARRISON v. STATE.

No. 2058. Decided November 27, 1912.

1.—Bribing Witness—Indictment.

Where the indictment, in a prosecution for bribing a witness, did not allege what character of process from the grand jury defendant sought to induce the alleged witness to avoid, or that it was unknown to them, etc., the indictment was insufficient.

2.—Same—Postponement—Accessory.

Where, upon trial of bribing a witness, the defendant showed in his application for postponement that he had been convicted as an accessory upon the identical facts for which he was being tried, and that he had appealed from said conviction, and therefore asked for a postponement until the other case was finally disposed of, so that he might plead former acquittal or conviction, the same should have been granted. Following, Maines v. State, 37 State Crim. Rep., 617, and other cases.

3.—Same—Other Transactions—Evidence.

Where, upon trial of bribing a witness, the State was permitted to introduce all the details of a seduction case to show that defendant had bribed the father of the alleged seduced female and induced him and his daughter by a bribe to leave the county in order to avoid testifying in the case, the same was reversible error, defendant not being present and had nothing to do with the seduction.

Appeal from the District Court of Comanche. Tried below before the Hon. J. H. Arnold.

Appeal from a conviction of bribing a witness; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Smith & Palmer and *Goodson & Goodson*, for appellant.—On question of postponement and former conviction: Murray v. State, 56 Tex. Crim. Rep., 438, 120 S. W. Rep., 437; Powell v. State, 42 Tex. Crim. Rep., 12, 57 S. W. Rep., 94, and cases cited in opinion.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was charged with bribing a witness. Omitting the formal part of the indictment, it charged that appellant corruptly offered to and paid T. G. Waldrip the sum of $150 in money, T. G. Waldrip being a witness in cases then and there in the District Court of Comanche County, said cases being then and there under consideration and investigation by the grand jury of the said District Court of Comanche County, said court being

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then and there in session and said cases being certain cases, wherein the State of Texas was plaintiff and Sam Wimberly, Sol Ingram and J. G. Daniel were defendants, and the said J. H. Harrison did then and there give to said witness, T. G. Waldrip, "who was then and there a material and important witness for the State in said cases, the sum of one hundred and fifty dollars in money to leave the County of Comanche, and take with him his daughter, Mattie Waldrip, who was also an important witness for the State in said cases, and to keep out of the way and not appear at said term of the District Court of Comanche County, Texas, against the said Sam Wimberly, Sol Ingram and J. G. Daniel, and to also keep the said Mattie Waldrip from appearing and testifying in said cases at said term of the District Court of Comanche County, Texas, against the said Sol Ingram, Sam Wimberly and J. G. Daniel, the said J. H. Harrison intending thereby to bribe the said T. G. Waldrip to avoid the process of the said District Court requiring him to appear as a witness in said causes."

A motion was made to quash this indictment on several grounds. Among others that it was no violation of the law to pay Waldrip $150 to take his daughter Mattie with him and leave the county; that the statute denouncing and punishing for bribing a witness means that the bribe must be offered to and for the purpose of bribing the witness and not to take another out of a county or away from the court. The bribery denounced by the statute applies to the witness and not to somebody else to be effected by that witness. If it was intended to charge Waldrip with bribing his daughter and appellant had furnished the money for that purpose, then if that was an offense this indictment would be against appellant as an accomplice and Waldrip as principal. This part of the indictment should not have been inserted. Possibly if this was the only question arising out of this allegation, it might be treated as surplusage, but the remainder of the indictment should state the case by its averments against appellant in regard to T. G. Waldrip. Again, it will be noticed that this indictment charges that appellant intended to bribe Waldrip to avoid the process of the court. Passing upon this, we desire to state that this matter is brought up in different forms. Of course, appellant could be guity if he bribed Waldrip to avoid the process of the court, but he could not be guilty under the indictment as charged, or bribing Waldrip to take his daughter away from the court. The indictment is, we think, deficient in that it does not allege what character of process from the grand jury appellant sought to induce Waldrip to avoid. The statute provides several ways by which a witness may be bribed and for various things. Appellant to be guilty must be shown to have bribed Waldrip to disobey process if it had been served on Waldrip, or if process had been issued but not served, then he must be bribed to avoid service of said process. The indictment should allege, we think, specifically, under the rulings of the Supreme Court and of this court, what that process was. If

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it was a subpoena, the grand jury knew it was a subpoena, because they issued it; they could not, therefore, allege that the character of process was unknown to them, or that they could not ascertain the character of process by diligent inquiry. If a subpoena or other process had been issued by the grand jury, that body knew what character of process it was. See Hughes v. State, 43 Texas, 518; Brown v. State, 13 Texas Crim. App., 358. In the Hughes case the court held that the indictment is defective if it fails to allege that the offer was made to either bribe a witness to disobey a subpoena or other legal profess, or to avoid the service of the same. In Brown's case it is said, if indictment charges that offer to bribe was made to induce a witness to disobey subpoena, it must allege the existence of a subpoena, and that the same was issued by legal authority. Tested by these decisions and the statute, we are of opinion that this indictment is not sufficient.

2. Appellant was indicted as an accessory and convicted on the identical facts which form a predicate for this prosecution. It is deemed unnecessary to go into a statement of the evidence and the recitations in the bills of exceptions, but it was agreed by counsel and ratified by the court in his approval of the bills of exception that the facts introduced in both cases were identical and the prosecution relied upon the identical facts to sustain both indictments. The bills of exception are quite lengthy. The appellant's first motion was to postpone the trial of this case until the final disposition of the other case, reciting that appellant had been convicted as an accessory and allotted a term in the penitentiary upon the identical facts relied upon in this case; that his motion for new trial had been overruled, sentence pronounced and notice of appeal given to the Court of Criminal Appeals. Upon this motion he asked a postponement of this case until the other case was finally disposed of in order that he might plead either former conviction or former acquittal, as the facts and the condition of the record would then indicate. He then filed his plea of former conviction setting up practically the same facts as in the other, to-wit: that he had been convicted in the other case, motion for new trial overruled, and notice of appeal given. This seems to have been done out of an abundance of caution so as to be certain to have the questions properly presented to the court, in order that he might not be twice convicted on the same facts and for the same act. Without discussing the second motion, to-wit: the plea of former conviction, we say there is no question under our law, that the first motion should have been granted and the case should have been postponed. Under the constitutional provision that no man shall be twice convicted of the same offense, and the showing made, approved by the court, two convictions occurred on the same transactions and on identically the same facts. This plea should have been sustained. See Maines v. State, 37 Texas Crim. Rep., 617; Powell v. State, 42 Texas Crim. Rep., 12; Murray v. State, 56 Texas Crim. Rep., 438.

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3. The theory of the State was that appellant had bribed Waldrip to take his daughter out of the country and himself leave the country in order to avoid testifying in a case against Wimberly for seducing Mattie Waldrip. There is also an indication that another case was being investigated, to-wit; against Wimberly, Ingram and Daniels for producing an abortion upon Mattie Waldrip. There was testimony, and among others the testimony of Mattie Waldrip, that Sam Wimberly had seduced her and that Ingram, Wimberly and Dr. Daniels produced an abortion upon her. The fact that there was such a case being examined, and that Waldrip was a witness in it was legitimate, but the State introduced, over appellant's objections, all the details of the seduction and all the facts bearing upon it as well as all the details of the abortion, the same as if appellant was on trial for each or both of those offenses. This was clearly inadmissible. Appellant was not present and had nothing to do with either the seduction or the abortion and there is no contention anywhere in the record that he was. The only connection that he is alleged to have had with these matters, or sought to be proved, was the fact that while the grand jury was investigating these matters against the parties named above, he induced Waldrip to leave the country and carry his daughter Mattie with him. It would make no difference so far as defendant was concerned in this case, what the facts were in regard to the seduction or abortion. He was charged with bribery and the facts in regard to the seduction were totally immaterial. The fact that he sought to induce a witness to leave to prevent the investigation of the grand jury was sufficient. All the facts on the part of Wimberly in seducing the woman or the act on the part of Wimberly, Dr. Daniel and Ingram in bringing about an abortion, were not only irrelevant, but highly prejudicial to defendant and clearly inadmissible. These questions are presented to the court, first, in objections to testimony; second, in motion to exclude, and third in charges to the jury, all of which are timely and properly preserved in the record.

There are some other matters that arose during the trial and presented here for review, some of which would be reversible error, but in the light of this opinion, we deem it hardly necessary to review them. The trial court will understand from what has been said how the case should subsequently be tried. The judgment is reversed and the cause is remanded.

Reversed and remanded.

JOE CUELLAR V. STATE.

No. 2245. Decided February 19, 1913.

Rehearing denied March 12, 1913.

1.—Aggravated Assault—Complaint—Information.

Where the complaint and information were strictly in accordance with approved precedent, the same were sufficient.

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2.—Same—Sufficiency of the Evidence—Excessive Punishment.

Where, upon trial of aggravated assault by an adult male upon a female, the evidence showed that defendant indecently fondled the person of the prosecutrix without her consent, the conviction was sustained and a fine of $200 and twelve months confinement in the county jail was not excessive.

3.—Same—Newly Discovered Evidence—Affidavit—Attorney and Client.

Where the motion for new trial was supported by affidavits made before appellant's counsel as notary public with reference to newly discovered evidence, the same could not be considered on appeal; besides, the alleged newly discovered evidence was known to or could have been known by defendant and his counsel before trial.

Appeal from the County Court of Bexar. Tried below before the Hon. P. H. Shook.

Appeal from a conviction of aggravated assault; penalty, a fine of $200 and twelve months confinement in the county jail.

The opinion states the case.

Leonard Brown, for appellant.—On question of insufficiency of the evidence: Crawford v. State, 1 S. W. Rep., 447; Chambless v. State, 79 S. W. Rep., 577; Lee v. State, 85 S. W. Rep., 798.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—Appellant appeals from a conviction for aggravated assault with a penalty of a fine of $200 and 12 months in jail.

The complaint and information are strictly in accordance with the statute and with the forms laid down by Judge White in his Annotated Code, and many times approved by this court.

The main contention is that the evidence is insufficient to sustain the judgment and that the penalty is excessive. The statute authorizes a fine for this offense of not less than $25 nor more than $1,000, or imprisonment in the county jail not less than one month nor more than two years, or by both such fine and imprisonment.

There were but two witnesses—Mrs. Ollie Stevens, the complaining witness, and the appellant himself. After testifying that her name was Mrs. Ollie Stevens, that she lived in San Antonio, knew appellant by sight, and pointing him out, she testified: "On August 22nd, 1912, I went in the Empire Theater in San Antonio, Bexar Co., Texas, to watch the moving pictures. I took a seat in the last row of seats in the house. My little boy was sitting next to me. The defendant came back of the chair where I was sitting, and leaned over the back of my chair, put one arm on the top of the back of the chair, and put his other arm and hand through the space between the chair I was sitting on and the next chair, and he ran his hand across my back, waist and hip (the witness here indicated by running her hand below her hips). Just as I felt his hand on me, I reached back and felt his hand. I caught his hand and turned around to him and said: 'You stinking

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pup, take your hand away.' He took his hand away and ran away and left his hat. That was the first time I ever saw the defendant. There was a picture on the canvass at the time. It was not very dark; it was light enough to see distinctly. It was not his foot that touched me, it was his hand, because I reached back and felt it. I can tell the difference between a hand and a foot; it was his hand I felt."

Appellant testified that he was in the employ of said theater at the time as extra film operator. He identified Mrs. Stevens and the time and place and circumstance of the alleged assault. He admitted she was sitting where she claimed she was; that he took a position back of her to watch the moving pictures; that he put his foot in between two chairs, resting his arms on the back of her chair; that when he had his hands on the seat occupied by her she turned around and said "take your hands away"; that he did not touch her with his hands; that he had his foot between the two seats and was moving it a little and that he might have touched her with his foot. He claimed that he did not run away, but that he went upstairs to talk to the operator, stayed there a little while, went back and got his hat and went out; that he intended no harm to her.

The court heard these witnesses testify and saw them and their manner, etc., when testifying. He, under the circumstances, is much better qualified to determine their veracity and the weight of their evidence and the punishment that should be meted out to the appellant than this court could possibly be. It is common knowledge that ladies without a male attendant, and sometimes only with their children, attend the picture shows such as Mrs. Stevens was attending. Certainly the courts ought, by imposing a sufficient penalty, punish any employe of such show who, without occasion and without the slightest justification, insults and commits an assault and battery, such as the evidence shows was done in this case, in order to deter others, as well as punish the one committing such an offense. In our opinion the evidence is amply sufficient to sustain the conviction, and we would not be justified in reversing the judgment, because the Judge, under the circumstances, imposed the penalty he did.

One ground of appellant's motion for new trial was his claimed newly discovered evidence. All of the affidavits attempting to show this by the witnesses was sworn to before appellant's attorney. This court has uniformly and in many decisions held it would not and could not consider affidavits so made. Maples v. States, 60 Texas Crim. Rep., 69; Scott v. State, 65 Tex. Crim. Rep., 40; 143 S. W. Rep., 610; Patterson v. State, 63 Texas Crim. Rep., 297. But even if we could consider this question, the affidavits clearly show that the claimed evidence was not newly discovered. Appellant testified that the space between the chairs where Mrs. Stevens was sitting was too small to permit him to run his hand between them and put it on her and undertake to fondle her as she claimed. The fact that other witnesses since the trial had gone and examined the chairs and would

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testify to the same thing, therefore, could not be newly discovered evidence. Besides, the claimed newly discovered evidence and motion in no way complies with the law. Gray v. State, 65 Tex. Crim. Rep., 204; 144 S. W. Rep., 283.

We have considered all of appellant's grounds and his brief presented, and no reversible error is shown.

The judgment is affirmed.

Affirmed.

[Rehearing denied March 12, 1913.—Reporter.]

JOHN MUELLER v. STATE.

No. 2339. Decided February 19, 1913.

1. Illegal Practice of Medicine—Indictment.

Where, upon trial of unlawfully practicing medicine, the indictment followed approved precedent, the same was sufficient. Following Singh v. State, 66 Texas Crim. Rep., 156, and other cases.

2.—Same—Election by State—Different Courts.

Where the indictment in a misdemeanor case charged the offense in two separate counts, the State could not be required to elect; besides, the court only submitted one count and this in itself was an election.

3.—Same—Sufficiency of the Evidence—Public Professing.

Where, upon trial of unlawfully practicing medicine by publicly professing to be a physician, without having first registered a license, etc., the evidence supported the conviction, there was no error; see opinion for facts showing that defendant held himself out as a physician for pay without license.

4.—Same—Evidence—Advertisement—Practitioner.

Where, upon trial of unlawfully practicing medicine, the State was permitted to introduce in evidence defendant's advertisement by which he offered to practice medicine, there was no error, although the advertisement did not in so many words state that he was a practitioner or physician.

5.—Same—Evidence—Names of Persons Treated.

Upon trial of unlawfully practicing medicine without license for pay, there was no error in introducing numerous witnesses for the State who stated that they had been treated by defendant for various ailments and diseases, although they were not named in the indictment.

6.—Same—Evidence—Husband and Wife—Payment.

Upon trial of unlawful practicing medicine, there was no error in showing that the persons treated by the defendant paid defendant's wife in his presence for such treatment; besides, it was shown by other testimony that defendant received payment directly and indirectly for such medical treatment.

7.—Same—Precedent—Practice on Appeal.

Where, upon appeal from a conviction of unlawfully practicing medicine, the questions raised had been discussed and decided adversely to appellant in numerous cases, it was not necessary to pass on them again. Following Ex parte Collins, 57 Texas Crim. Rep., 2.

Appeal from the District Court of Gillespie. Tried below before the Hon. Clarence Martin.

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Appeal from a conviction of unlawfully practicing medicine; penalty, a fine of $100 and twenty-four hours confinement in the county jail.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.—Cited cases in opinion, and also Ex parte Collins, 57 Tex. Crim. Rep., 2; Melling v. State, 150 S. W. Rep., 434; Stiles v. State, 66 Tex. Crim. Rep., 665; Gumay v. State, 62 Tex. Crim. Rep., 276; Dankworth v. State, 61 id, 157; Newman v. State, id, 338.

PRENDERGAST, JUDGE.—Appellant appeals from a conviction for unlawfully practicing medicine with a penalty of a fine of $100 and twenty-four hours in jail.

The indictment is substantially in accord with the statute and is such as this court has uniformly and repeatedly held good. Ex Parte Collins, 57 Texas Crim. Rep., 2; Singh v. State, 66 Tex. Crim. Rep., 156; 146 S. W., 891; Stiles v. State, 66 Tex. Crim. Rep., 665; 148 S. W., 326, and other cases.

The indictment in this case was in two counts. The first charged that appellant practiced medicine without authority and without license properly registered, sworn to, etc., on certain persons, naming them. The second count is that he publicly professed to be a physician and offered to treat diseases and disorders, etc., without first having registered his license to do so, with his proper address, age, etc. The court did not submit the first count, but submitted only the second.

Election between counts can not be required in misdemeanor cases. Stebbins v. State, 31 Texas Crim. Rep., 294; Thompson v. State, 32 Texas Crim. Rep., 265. Even in felony cases, where election can be required, when the court submits the case under one count, that itself is an election.

The uncontradicted evidence clearly shows that appellant, by his public advertisements in newspapers, and to others, publicly offered to practice and professed to be able to cure practically any and all diseases and invited all afflicted to call on him for that purpose, but in his advertisements and in his talk to many of his patients he would tell them specifically he made no charge. In his advertisements he stated: "Positively no charges made, but the labor is worth the hire," and repeatedly stated this to some of his patients. However, the evidence discloses that numerous of his patients, whom he did treat, paid him indirectly. One paid to his wife in his presence; others by doing work for him; others by making him or his wife presents; another by renting him a house and collecting no rent for several months. To one he prescribed medicine and furnished it. Others paid him money directly for his treatment of them. One witness whom he treated re-

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peatedly and for some time, stated that in discussing the treatment and his charges, he said: "I won't charge you anything—I don't know how many times he said that—nothing but if you make me a present it is welcome. * * * I made him a present—it was in money. Sometimes I would hand him a dollar and sometimes two dollars or something like that. I never told him, here is your money. I just put it in his hand and he never looked at it. He just put it in his pocket." It was also shown that he called himself "Dr. Mueller" and was generally known and called "Dr. Mueller" and that was the title he gave himself. He was shown not to have any license registered. The evidence clearly justified the verdict.

When the State offered to prove by the editor of the newspaper and to introduce appellant's published advertisements therein, showing that he professed to cure any and all diseases and inviting everybody afflicted to come to him for treatment, appellant objected because such advertisement did not show that he was practicing or offering to practice medicine, and that in said advertisement he did not claim to be a physician or practitioner of medicines belonging to any school, and he expressly stated in said advertisements that he made no charge. In his advertisements he called himself "Professor" Mueller, but the whole of it shows, and only shows, that he was offering to practice, and the testimony by the witnesses shows that he did actually practice medicine on men, women and children and that was his profession. He also objected to this testimony, because the State had not then shown that he treated the three persons named in the first count of the indictment. This evidence was clearly admissible.

The State introduced numerous witnesses who testified that at various and sundry times, about the time charged in the indictment, appellant treated them for various ailments and diseases. This was objected to because the indictment did not specifically name these persons or either of them as the ones whom he treated. This testimony was clearly admissible as tending to prove the State's case as alleged by either and both of said counts.

By another bill he objected to the testimony of one witness, who swore that after his treatment, in the presence of appellant, he paid to appellant's wife some money therefor and that she accepted it after he had offered it to appellant directly and appellant had declined to take it, because by such proof the wife would be thereby indirectly testifying against her husband. There was no error in permitting this testimony. Even if there had been, the uncontradicted testimony by many other witnesses showed that they had paid to appellant, directly and indirectly, money and other things for his treatment of them.

The questions arising in this case have been so often discussed and decided against appellant that we deem it unnecessary to discuss any of them again. This case in no way differs from the many cases this court has considered and uniformly affirmed under prosecutions under this statute. See Collins v. State, recently decided.

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We have carefully considered all of appellant's complaints. The testimony is uncontroverted, is amply sufficient, and no other verdict, under the testimony, could or should have been rendered than that of conviction.

The judgment will be affirmed.

Affirmed.

Ex Parte R. C. Botts.

No. 2367. Decided February 19, 1913.

Rehearing denied March 12, 1913.

1.—City Charter and Ordinance—Police Power—Hogs at Large.

A hog is that character of animal that his keeping may be absolutely prohibited in the thickly inhabited portions of a city, and where the ordinance restricted the keeping of hogs in the City of Gonzales to certain limits, describing the metes and bounds in which hogs could not be kept, which covered about one-half the corporate limits of the city, the same was a valid ordinance and a conviction of relator for a violation thereof in the Corporation Court will not be set aside on writ of habeas corpus. Following Ex parte King, 52 Texas Crim. Rep., 383, and other cases.

2.—Same—Judicial Knowledge—Hogs, Nature of—Police Power.

The courts will take judicial cognizance of the nature and habits of the hog, and the results incident to his keeping and confinement within the limits of the populous portion of a city, and that their keeping may be absolutely prohibited therein under the police regulations of the city. Following Ex parte Glass 90 S. W. Rep., 1108.

Appeal from the County Court of Gonzales. Tried below before the Hon. J. W. Holmes.

Appeal from a habeas corpus proceeding asking release from a conviction in the Corporation Court of a violation of the city ordinance, forbidding the keeping of hogs within certain city limits; penalty, a fine of $10.

The opinion states the case.

Blanton & Green, for relator.—On question of invalidity of ordinance: Ex parte Smith, 51 Tex. Crim. Rep., 395; 102 S. W. Rep., 115; Pye v. Peterson, 45 Texas, 312.

W. E. Jones, for respondent, and *C. E. Lane*, Assistant Attorney-General, for the State.—Cited cases in opinion.

HARPER, Judge.—The application for habeas corpus addressed to Hon. J. W. Holmes, County Judge of Gonzales County, shows that relator was prosecuted for violating an ordinance of the City of Gonzales, which restricted the keeping of hogs in said city to certain limits, describing by metes and bounds the limits in which hogs could not be kept. In the statement of facts it is agreed the territory embraced in the ordinance and in which hogs were not permitted to be kept

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"covers about one-half of the corporate limits of said City of Gonzales, and includes the business section and most heavily populated residence section of said city."

Relator was convicted in the Corporation Court, and on habeas corpus was remanded by the county judge, and from this latter judgment prosecutes an appeal to this court, his contention being that the ordinance was void, in that the city council was without authority to pass an ordinance absolutely prohibiting hogs to be kept in any portion of said city, contending that their authority only extended to prescribing the mode and method of keeping hogs, and did not embrace authority to absolutely prohibit them from being kept in any part of the city.

Relator admits that hogs are of that species of animals which a city has the right to regulate the keeping, but contends that he is not of that character which the city has the right to absolutely prohibit the keeping. In the case of Cohen v. Rice, 101 S. W. Rep., 1052, our Court of Civil Appeals discussed at length the power of a city to prohibit a thing, subject to the police power, in certain parts of a city, and permitting it in other portions thereof, and hold that this is a reasonable regulation, when it does not by its terms amount to absolute prohibition. This has also been the holding of this court. (Levine v. State, 46 Texas Crim. Rep., 533; Williams v. State, 52 Texas Crim. Rep., 371; Ex parte King, 52 Texas Crim. Rep., 383.) Thus it is seen that an ordinance providing that hogs may be kept in certain parts of a city under given conditions, and providing that they may not be kept within certain limits, has been held to be a regulation of that character of business, and as relator admits that the city may regulate, this ordinance would not be invalid.

However, we do not base our opinion solely on this proposition. The statement of facts in this case does not disclose the mode and method and the circumstances under which the hog or hogs were kept in this instance, and the proposition before us is, is a hog the character of animal that his keeping may be absolutely prohibited in the thickly inhabited portions of a city? We think this should be answered in the affirmative. The Cyclopedia of Law, Vol. 16, page 852, lays down this proposition of law: "Courts may properly take judicial notice of facts that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence," citing authorities from Alabama, California, Connecticut, District of Columbia, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, Oregon, Virginia, Washington, and the United States Supreme Court, which will be found collated in the volume herein referred to.

This court soon after its organization adopted the general rule laid down by Mr. Greenleaf: "Courts will generally take notice of whatever ought to be generally known within the limits of their jurisdic-

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tion.'' (Moore v. State, 7 Texas Crim. App., 14.) And this has always been the rule in this court and the Supreme Court, and with this well known rule of law in view, we should and will take judicial cognizance of the nature and habits of a hog, and the results incident to his keeping and confinement within the limits of a populous portion of a city. It is, we think, known of all men, that hogs when confined within narrow limits, have an offensive odor; that their habits are unclean, and by their mode of life create not only an offensive condition of affairs, but create a condition from which pestilence and disease arise, and it is one of the chief duties of a city or State under police power to protect the life and health of its citizens. We are not treating of a hog kept under extraordinary conditions, but kept in the usual and customary way they are kept in cities and towns, and when so kept we think the keeping of them would be injurious to the health of the community, and the odors arising would make the air offensive and very impure. Entertaining these views, we think this court was correct in its holding in the case of Ex parte Glass, 49 Tex. Crim. Rep., 87; 90 S. W. Rep., 1108, wherein an ordinance similar to the one involved in this case was held to be valid exercise of the police power conferred on cities by our statutes.

The judgment is affirmed.

Affirmed.

[Rehearing denied March 12, 1913.—Reporter.]

JOHN WILLIAMS v. STATE.

No. 2287. Decided February 19, 1913.

1.—Theft—Receiving Stolen Property—Misdemeanor—Charge of Court.

Where there are two theories made by the evidence, one by the State, that the alleged stolen property was over the value of $50, and one by the defendant that it was under the value of $50, the failure of the court to submit misdemeanor theft or the receiving of property under the value of $50 was reversible error.

2.—Same—Indictment—Grand Jury—Unknown Fact—Variance.

Where the indictment alleged that the defendant received the alleged stolen property from some person to the grand jurors unknown, and the evidence showed that the grand jury knew or could have known from whom defendant received the property, the variance was fatal. Following Jorasco v. State, 6 Texas Crim. App., 238, and other cases.

Appeal from the District Court of Harrison. Tried below before the Hon. H. T. Lyttleton.

Appeal from a conviction of theft; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Y. D. Harrison and *Geo. J. Ryan*, for appellant.—On question of court's charge on value of property: Barnes v. State, 44 S. W. Rep.,

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491; Thomas et al v. Sanders, 150 S. W. Rep., 768; Ross v. State, 10 Texas Crim. App., 455; White v. State, 13 id, 259; Ezzell v. State, 29 id. 521; Wills v. State, 40 Texas, 70; Cannon v. State, 18 Texas Crim. App., 172.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, Presiding Judge.—The indictment contained two counts,—one charging theft of 576 pounds of scrap brass of the value of fifty-one dollars. The second charged appellant with receiving the same brass from some person to the grand jurors unknown, and that he did also fraudulently conceal the property, after having received, or acquired it, from some person to the grand jurors unknown, etc.

The court submitted the second count, to wit: receiving and concealing stolen property. The evidence for the State shows that the property was worth 11½ and 12 cents per pound, and as the first witness testified, $60 or $70. The defendant testified that Mr. Applebaum bought that character of stuff in Marshall and it was worth 5 cents per pound; that that was the amount Mr. Applebaum paid for that character of stuff. This is the evidence in substance on that question.

The court charged the jury generally that if they believed appellant received the 576 pounds of brass, he would be guilty and the jury should convict and send him to the penitentiary. There isn't anything further in the charge as to the value. Objection was urged that the court did not submit misdemeanor theft or the reception of property under the value of $50. This was set up in the motion for new trial and specifically pointed out. It is unnecessary to state the grounds set up in the motion. The matters are sufficiently presented to require consideration. This contention of appellant is correct. There were two theories made by the evidence, the State's contention that the property was worth 11½ and 12 cents, or $60 or $70, that by the defendant it was worth 5 cents and sold in the market at 5 cents. The issue was presented and the court erred in not submitting it to the jury. For this reason the judgment must be reversed.

There is another question of serious moment in the case, but barely, if at all, urged in the motion for new trial. Inasmuch as the judgment must be reversed for the reasons above stated, attention is called to the fact that there is a variance between the allegations and the evidence. It is alleged in the indictment that appellant received the property from some person to the grand jurors unknown. The evidence discloses that on the night appellant was arrested with the property in his possession, the officers knew,—and the evidence all shows that appellant received the property from Roy Williams. If the statement of facts shows any one thing clearly, it is that fact. The grand jury with these witnesses before them knew from whom appellant received the brass, or could have known, because several if not all the witnesses, who had anything to do with appellant that night,

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testified that they so knew. The grand jury were not justified in indicting him for receiving stolen property from some person unknown to them. They knew from the testimony that appellant received it from Roy Williams. All the officers who testified in this case, as well as defendant, whose statement was taken before the grand jury, show that they knew it, and not only so, but the conviction was predicated upon the evidence of these officers and the statement of the defendant. Jorasco v. State, 6 Texas Crim. App., 238, and all subsequent cases to date.

The judgment is reversed and the cause remanded.

Reversed and remanded.

THOMAS COLLUM V. STATE.

No. 2269. Decided February 19, 1913.

1.—Forgery—Indictment—Grand Jury—Description—Variance.

Where, upon trial of forgery, the grand jury did not describe in the indictment the alleged forged instrument as it was in fact given and as they could have described it by fair and reasonable diligence, the indictment was not sufficient, and there was therefore a variance between the allegation and the instrument forged, and the judgment must be reversed and the cause remanded.

2.—Same—Rule Stated—Diligence—Indictment.

Wherever the grand jury could have known by ordinary diligence the true facts, they are not authorized to set out by averment in an indictment an excuse for not setting out the real facts. Following Carlton v. State, 60 Texas Crim. Rep., 584, and other cases.

Appeal from the District Court of Shelby. Tried below before the Hon. W. C. Buford.

Appeal from a conviction of forgery; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

D. M. Short & Sons, for appellant.—On question of insufficiency of the indictment: Carlton v. State, 60 Texas Crim. Rep., 584, and cases cited in opinion.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—The indictment charges appellant with forgery. The indictment alleges,—that part which it is necessary here to consider,—as follows: "Which said instrument, before being altered as aforesaid, was substantially in words and figures as follows, to wit: Joaquin, Texas. Pay to Thomas Collum, $1.65. Mr. Carlson, the same having been destroyed by the defendant, and which said instrument was so altered by the said Thomas Collum as aforesaid in the manner following, that is to say, the figures of $1.65 was so altered as to read $11.65, as to make the said instrument falsely appear to be

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and appear substantially as follows, to wit: Joaquin, Texas, July 15th, 1912. First State Bank of Joaquin, Texas. Pay to Thomas Collum $11.65. M. Carlson (a better description of which the grand jury is unable to give, because said check was destroyed by said defendant), against the peace and dignity of the State." Only the latter portion of the indictment is quoted above, as only the quoted portion is brought under criticism.

The proposition is asserted for reversal that the grand jury did not describe the instrument as it in fact was given, and as they could have described it by any fair or reasonable diligence; that they had the evidence before them by which they could have determined exactly and verbatim the instrument alleged to have been altered, and that therefore the indictment was not sufficient and therefore there was a variance between the allegation and the instrument forged. Carlson testified that he gave appellant a check on the 15th of July, 1912, for $1.65, and took his receipt for it. McNeill testified that as constable he arrested appellant some time in July on this charge, upon which occasion he saw a part of the check. Here the witness took a blank check and illustrated to the jury the part which he had found in the defendant's possession, by drawing an outline with a pencil of the portion he had in his possession. "I found on the portion of the check in the defendant's possession the figures '$11.65' and the name 'M. Carlston' written on the line. I also found the word 'leven' written on a portion of the check, which I found in the defendant's possession. There might not have been all of this word there, but there was enough so that you could tell it was the word 'eleven.' I also noticed where the cashier had stamped the word 'Paid' across the check. The defendant told me that he had destroyed the other part of the check." This witness, being cross-examined, testified as follows: "The check, a portion of which I found in the possession of the defendant, upon the occasion of his arrest, had printed on it the following, and the words and figures to which I have testified in my direct examination, were inserted in the blanks appearing on the following check, to wit:

'Joaquin, Texas, ..., 191... No. ....

THE FIRST STATE BANK
Of Joaquin, Texas.

Pay to ...., or bearer, $...... .... Dollars.

................'

I was before the grand jury, which returned this bill of indictment, and was asked some questions about this case."

Hugh Jones testified he resided at Joaquin, Texas, and was Cashier of the First State Bank there. "I know the defendant, and about twelve o'clock on July 15, 1912, he presented a check with M. Carlston's signature, for $11.65 for payment. I stamped it paid, but upon fur-

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ther examination concluded not to pay it, and passed it back to the defendant, telling him that was a funny way old man Carlston had of spelling eleven, because I discovered that the word eleven was spelled 'Leven.' I also told the defendant that if he wanted the money he would have to get old man Carlston to give him another check; that Carlston might say he did not intend this check to be that much." This witness says they separated, defendant going off and witness going to dinner; that subsequently the appellant returned with the check and presented it again, stating that old man Carlson would not give him another check. Witness declined to pay it and appellant left. Witness told him not to come back any more with his check. "The check which the defendant presented had the figures '11.65' thus, and just like an ordinary bank check and the writing was 'Leven & 65/100.' It was signed by M. Carlston and drawn on the Joaquin State Bank, at Joaquin, Texas. All this occurred at Joaquin, Texas."

Upon cross-examination this witness testified as follows: "I saw a portion of this check several days afterwards. It seemed to have been torn into three parts. I am unable to state now exactly whether all of the word 'Leven' was on it, as I did not pay particular attention to it. The figures '65' and the figures '100' and the word 'dollars' were on there and the figure '11' was also on the portion I saw. I had no special occasion for examining this portion, and I never noticed it particularly the last time I saw it; it was in the hands of the justice of the peace, before whom the defendant had his examining trial. I do not know whether the check was made payable to bearer or order. When the defendant presented the check for payment, his name was endorsed on the back of it. The front part of the instrument, as well as the endorsement, was written with an ordinary black pencil. The word 'Leven' was written in the space in which some word seemed to have been first written and erased." It was admitted in the record that the other portions of the torn check were not found. Carlson testified to his want of consent in changing the check from $1.65 to $11.65. Carlson was also before the grand jury and was questioned about the transaction. He says: "The check shown me and introduced in evidence, and found in this statement of facts, had the same writing and figures on it, so far as form is concerned, as the one which I gave the defendant. I merely filled in the blanks and inserted the date and signed my name. In other words, the following is substantially a copy of the check I gave the defendant.

'Joaquin, Texas, July 15, 1912. No. 441.

THE FIRST STATE BANK
Of Joaquin, Texas.

Pay to Thom Collum or Bearer $1.65

One 65/100 .... Dollars.

M. Carlston.'

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"On re-direct examination and on re-cross examination this witness stated that there was no substantial difference as to the words and figures between the check in the record and that given the defendant by him, though there might have been some difference as to the size of the paper."

Sanders testified that the torn parts of the check were lost; that he was county attorney and that he could not find them. It was also stated by this witness that the witnesses Carlson, Jones and McNeill were, in July, 1912, and are now, resident citizens of Shelby County. So it will be seen that the check was written upon the blank form mentioned by the witness McNeill, and it is also shown that McNeill was before the grand jury, as was the cashier of said State Bank of Joaquin, and if the grand jury had desired they could have, by the slightest diligence, found out exactly the character of check, the blanks of which were filled in by Carlson when he signed the check for $1.65. The blank form, he says, was the same as given here, which was, pay to ...., or bearer, ... dollars. This check was filled out, making it read:

"Pay to Thom Collum, or bearer, $1.65.
One 65/100 .... Dollars."
M. Carlston.

Whereas, the check set out in the indictment was made to read:

"Pay to Thomas Collum, $1.65, (in figures) M. Carlson."

By observing the two instruments they are not the same so far as the reading of the face of them is concerned, and the facts show, beyond any question, that the grand jury had the witnesses before them by whom they could have reproduced it exactly,—that is, by its tenor. Appellant brought this matter to the attention of the court in various ways. By charges, exceptions to charges, attack on the sufficiency of the evidence in the way of variance. In fact, counsel urged all possible objections from legal standpoints. This case falls squarely within the rule laid down in Carlton v. State, 60 Texas Crim. Rep., 584, and it follows the unbroken line of authorities therein cited. Appellant has collated quite a number of cases, among others, Jorasco v. State, 6 Texas Crim. App., 238; Jorasco v. State, 8 Texas Crim. App., 541; Brewer v. State, 18 Texas Crim. App., 456; Williamson v. State, 13 Texas Crim. App., 514; Atkinson v. State, 19 Texas Crim. App., 462; Webb v. State, 39 Texas Crim. Rep., 534; Pierce v. State, 38 Texas Crim. Rep., 604; Greenl. on Evid., sec. 32; Bish. Cr. Proc. (2 ed.), 549-552; Whart. Am. Crim. Law, sec. 251; Branch's Crim. Law, sec. 383, for collated cases.

It has been by unbroken line of authorities the settled law in Texas that wherever the grand jury could have known by ordinary diligence the true facts they are not authorized to set out by averment in an

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indictment an excuse for not setting out the real facts. The form used by Carlson, to wit: the form used by the First State Bank at Joaquin and the cashier of that bank could have been had before the grand jury. The cashier lived in Shelby County at the time. Carlson, who wrote the check on the First State Bank form was in the county, and before the grand jury. McNeill, who testified to the form, was also before the grand jury; and there is no excuse why the form of check used and alleged to have been forged could not have been reproduced before the grand jury, and set out in the indictment. This very question was decided in the Carlton case, supra. The excuse given by the grand jury was the instrument had been destroyed. We refer again to Carlton's case, supra. The grand jury could have had the cashier of the bank before them; Carlson, who drew the check, and McNeill, who reproduced the form of the check, were residents of that county and could have testified before that body as they did before the jury.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

M. C. M. MANLEY V. STATE.

No. 2300. Decided February 19, 1913.

1.—Theft—Evidence—Re-Direct Examination.

Upon trial of theft over the value of $50, where defendant sought to break the force and effect of the testimony of a material State's witness on cross-examination to show ill-will towards defendant, there was no error in permitting the State, on re-direct examination, to explain each of the transactions testified about on cross-examination.

2.—Same—Rule Stated.

It has always been the rule that if it is sought to discredit a witness on cross-examination, that he may state the real facts connected with the questions inquired about and by which it is sought to impair his credit, on re-direct examination. Following Tippett v. State, 37 Texas Crim., Rep. 186.

3.—Same—Case Stated—Limiting Testimony.

Where the defendant illicited from the State's witness on cross-examination that he had aided those who tried to have defendant's certificate as a teacher cancelled, etc., for the purpose of affecting his credibility as a witness, it was permissible for the State to show that it was not a wanton and malicious act and to let the witness state the reasons that impelled him to such act, and there was no reversible error in not limiting this testimony. Following Schwartz v. State, 53 Texas Crim. Rep., 449, and other cases.

4.—Same—Evidence—Fruits of Crime—Acts of Defendant.

Upon trial of theft of money over the value of $50, there was no error in admitting testimony that immediately after the arrest of defendant, the latter requested the witness to carry him to the bank and that when he got there, he talked with the banker and deposited with him $800, part of which was that alleged to have been stolen; this was admissible under Article 810, Code Criminal Procedure. Following Martin v. State, 57 Texas Crim. Rep., 595, and other cases.

5.—Same—Charge of Court—Circumstantial Evidence.

Where, upon trial of theft of money over the value of $50, the evidence was circumstantial and the court, in his charge, properly applied the law to the

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facts of the case and gave a proper charge on circumstantial evidence, there was no error. Following Mosely v. State, 59 Texas Crim. Rep., 90, and other cases.

6.—Same—Argument of Counsel—Allusion to Defendant's Failure to Testify.—Article 841, Code Criminal Procedure.

Where, upon trial of theft of property of the value over $50, State's counsel, in his argument, stated that defendant was not put on, in connection with his argument on defendant's reputation, the same was an allusion to defendant's failure to testify; especially, as the court refused to hear the testimony on this point on motion for new trial, which defendant offered to submit orally instead of by affidavit.

7.—Same—Declarations of Third Party.

Conversations between the witness and third parties in the absence of the defendant are inadmissible in evidence, having no direct connection with the offense.

Appeal from the District Court of Rains. Tried below before the Hon. R. L. Porter.

Appeal from a conviction of theft over the value of $50; penalty, seven years imprisonment in the penitentiary.

The opinion states the case.

O. H. Rodes and *W. W. Berzett* and *Wynne, Wynne & Gilmore,* for appellant.—On question of limiting testimony: Coker v. State, 35 Texas Crim. Rep., 57; Owens v. State, 35 id., 345; Wilson v. State, 37 id, 373; Foster v. State, 28 Texas Crim. App., 45; Washington v. State, 17 id, 197.

On question of depositing money with banker: Coker v. State, 35 Texas Crim. Rep., 57; Littlefield v. State, 24 Texas Crim. App., 167; Moody v. State, 24 id, 458; Maines v. State, 23 id, 568; Nalley v. State, 28 id. 387; Britain v. State, 52 Tex. Crim. Rep., 169; 105 S. W. Rep., 817.

On question as to statements of defendant under arrest: Gaston v. State, 55 Texas Crim. Rep., 270; Quintana v. State, 29 id, 401.

In question of allusion to defendant's failure to testify: Brown v. State, 57 Texas Crim. Rep., 269.

On question of hearsay testimony: Coker v. State, 35 Texas Crim. Rep., 57; Britain v. State, 52 Tex. Crim. Rep., 169; 105 S. W. Rep., 817.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was prosecuted and convicted of theft of property of more than $50 in value, and his punishment assessed at seven years confinement in the State penitentiary.

There are many bills of exceptions in the record, but in his brief appellant presents but few of them, and we will discuss first those presented in the brief.

The first relates to the witness Dowdle Jackson being permitted to

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give certain testimony and the failure of the court to limit it in his charge. This witness was a very material witness for the State, and testified to facts which would authorize the jury to find that he saw appellant taking the stolen money away at the time of the theft. To break the force and effect of this testimony, on cross-examination appellant, through his attorney, sought to show that this witness had ill-will towards appellant, was prejudiced against him, and his testimony was necessarily biased thereby. On cross-examination, at appellant's instance, he testified that he "did not love appellant as a nephew; that he was against appellant when Pitt Bridges and others tried to have his (Manley's) certificate cancelled to teach school; that witness believed appellant had stolen money from him on several occasions; one time $800; that there were steps taken to have Manley expelled from the Masonic lodge, and the part witness took in such action." All this testimony was adduced on cross-examination to show an intense ill-will on the part of witness towards appellant and thereby discredit the testimony he had given on direct examination on behalf of the State.

On redirect examination the State was permitted to have the witness explain each of these transactions and his connection herewith, the most damaging explanation being that at the time Pete Bridges and others were trying to have appellant's certificate cancelled, and when he said he (witness) was with them in such action, witness explained that appellant was charged with having illicit intercourse with two of his pupils, Pete Bridges' daughter and Mack Luke's daughter. That he considered such conduct wrong, and for this reason he (witness) was with Bridges and Luke and against appellant in that controversy. Witness also testified that the Masonic lodge instituted proceedings to expel appellant on account of this theft, and at the time such proceedings were instituted and before the trial in the Masonic lodge, the money was returned to the owner, being found by a sister-in-law of appellant at virtually the same place from which it was alleged to have been taken, when the proceedings in the lodge were dropped; that it was some twelve or fifteen years prior to this trial when witness accused appellant of stealing money from him. Appellant objected to all this testimony adduced on redirect examination, on the ground the testimony related to different offenses and on many other grounds. This question has been frequently before this court, and it has always been the rule that if it sought to discredit a witness on cross-examination, on redirect examination he may state the real facts connected with the question inquired about and by which it is sought to impair his credit. In the case of Tippett v. State, 37 Texas Crim. Rep., 186, Judge Henderson, in writing the opinion of the court, says: "In our opinion it would be exceedingly unfair to authorize the State, by this method of cross-examination, to impeach a witness by showing that he was then under a criminal charge or accusation, and not permit the defendant, in order to bolster his witness

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against such an assault, to show by said witness any circumstances or explanation that would go to relieve the witness of the imputation of untruthfulness or want of credit thus cast upon him by the State. We would not be understood as holding that the court would be authorized to enter into an investigation of the merits of this collateral issue, but we do hold, where this method of impeachment of a witness is resorted to on cross-examination, that, on the re-examination of the same witness, defendant should be permitted to show such explanatory circumstances, in connection with the matter inquired about, as would go to remove the implication of untruthfulness, and serve to reinstate the witness. This case is an apt illustration of the fairness of the rule. Here, in order to discredit the witness, the State was permitted to show that he was under indictment for the theft of three head of cattle. This left the witness under a cloud. He should have been permitted to state on his re-examination that he was a bona fide purchaser of said cattle, and had not stolen them. The accusation, with the explanation made by the witness, would then all be before the jury, who, in passing upon his credit, would take all the facts into consideration."

So in this case, when the appellant elicited from the witness, on cross-examination, that he had aided those who tried to have appellant's certificate as a teacher cancelled, etc., for the purpose of affecting his credit as a witness, it was permissible for the State to show that it was not a wanton and malicious act, but let witness state the reasons that impelled him to such action. Not whether appellant was guilty of such other offense and the court did not permit that inquiry, but the reasons for his conduct by which appellant sought to impair his credit. It is always proper when one seeks to show that a witness is unworthy of credit, on cross-examination, by eliciting certain facts tending to accomplish that purpose, to let the real facts be adduced to let the jury judge if the circumstances are such as in fact affect his credit. Appellant insists that if it was permissible to adduce this testimony on redirect examination, the court should have instructed the jury they could consider such matters only in passing on the credibility of the witness Dowdle Jackson, and for no other purposes. It perhaps would have been proper for the court to have so instructed the jury, but as nothing elicited could have been of any probative force in showing appellant's guilt of the charge for which he was being tried, nor could the jury have been misled into convicting appellant for such other offenses, the failure to limit the testimony would not present reversible error. (Carroll v. State, 58 S. W. Rep., 340; Brown v. State, 24 Texas Crim. App., 170; Schwartz v. State, 53 Texas Crim. Rep., 449; Thompson v. State, 55 Texas Crim. Rep., 120; Waters v. State, 54 Texas Crim. Rep., 327, and cases cited in Moore v. State, 65 Tex. Crim. Rep., 453; 144 S. W. Rep., 598, on motion for rehearing.) If the testimony introduced to affect the credit of a witness could be held to have any probative force as tending to show the guilt of the person of the crime for which he was being tried, or the jury was

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probably misled into convicting him of such other offense, and not the offense for which he was being tried, it would be reversible error to fail to limit the purposes for which said testimony was admitted, otherwise it does not do so. This is the line of distinction running through all of our reports, and is the correct rule.

The court permitted the witnesses Will Whittle, S. K. McCallon and Homer McCallon to testify that immediately after the arrest of appellant by Whittle that he (appellant) requested him to carry him to the McCallon bank, and when he got there that he called S. K. McCallon to one side, talked with him and then deposited with the banker $800. As by circumstances this is shown to be a part of the money for which appellant was being prosecuted for stealing, there was no error in admitting this testimony. Article 810, Code of Criminal Procedure, provides that if a person under arrest makes statements which tend to the finding of stolen property, such statements are admissible even though he be under arrest at the time of making such statements. In this case the acts, conduct and statements of appellant led to the finding of $800, which was identified, as nearly as it was possible to identify money, as a part of the stolen money. It was of the character and kind, and its condition was such as to lead one to almost conclusively know that it was a part of the money alleged to have been stolen, and under such circumstances there was no error in admitting his statements in evidence. (Martin v. State, 57 Tex. Crim. Rep., 595; 124 S. W. Rep., 681; Minu v. State, 60 Tex. Crim. Rep., 86; 131 S. W. Rep., 320; Smith v. State, 53 Texas Crim. Rep., 643; Collins v. State, 24 Texas Crim. App., 141; Johnson v. State, 44 Texas Crim. Rep., 332; Fielder v. State, 40 Texas Crim. Rep., 184; Speights v. State, 1 Texas Crim. App., 551; Brown v. State, 26 Texas Crim. App., 330.

The court correctly instructed the jury the law that this was a case depending on circumstantial evidence, and properly applied the law to a case of that character, therefore, there was no error in refusing special charge No. 6 requested. The court instructed the jury:

"In this case the State relies on circumstantial evidence for a conviction. In order to warrant a conviction of a crime on circumstantial evidence each fact necessary to the conclusion sought to be established must be proved by competent evidence, beyond a reasonable doubt. All the facts (that is, the necessary facts to the conclusion) must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no other person, committed the offense charged.

"But in such case it is not sufficient that the circumstances coincide with, account for and therefore render probable the guilt of the defendant. They must exclude, to a moral certainty, every other reasonable hypothesis except the guilt of the accused." (Mosely v.

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State, 59 Tex. Crim. Rep., 90; 127 S. W. Rep., 178; Reeseman v. State, 59 Tex. Crim. Rep., 430; 128 S. W. Rep., 1126; Trevino v. State, 38 Texas Crim. Rep., 64; Boggs v. State, 38 Texas Crim. Rep., 82; Baldez v. State, 37 Texas Crim. Rep., 413; Henderson v. State, 50 Texas Crim. Rep., 266; Hill v. State, 37 Texas Crim. Rep., 415.)

The next question presented is one of more difficulty. The official stenographer swears that he took down the closing speech of the district attorney, and that he used the following language: "I don't know whether he had been a benefactor to his race or not; they say they defied the State to put on any evidence to the contrary. Now Judge Wood and Mr. Berzett are both lawyers of years' experience in this State; they know as well as I know I am standing before you this morning that the State could not put the reputation of this man in issue—why didn't they do it. Yet they will stand up here when they fail to give the State an opportunity to put his reputation in issue and say they defied the State to show that there was anything against him. The State was absolutely powerless to put on a single witness as to his reputation out there in the community where he lived for being a peacable, law-abiding citizen. We could not do it until they first raised the issue and they did not do it; they did not open up his reputation, and they know as well as they know they are in the courthouse this evening, because every lawyer who has practiced law one year in the State knows that is the rule—that the State's mouth is closed as to reputation of defendant unless the defendant first puts his reputation in issue; why didn't they do it instead of standing here trying to get the jury to believe that the State could not do it; they defied the State, they say, and I was sitting here in my chair absolutely watching for the opportunity of showing him up. They didn't put him on; they didn't open it up; they didn't put in his reputation to the criticism of the jury; I ask them now if they want to go into the issue; I am willing; I am ready; I am anxious." Several witnesses also swear that the district attorney referred to the failure of the defendant to testify. The district attorney presented controverting affidavits of the jurors that he did not refer to the matter. When these contesting affidavits were presented the defendant requested the court to permit him to introduce the jurors who had filed the contesting affidavits and were in attendance on court, and cross-examine them in regard to the matter. The court refused to permit him to do so, and refused to hear any testimony. While Article 841 of the Code of Criminal Procedure provides that the court may hear evidence of a contest on a motion for new trial, by affidavit or otherwise, yet we can see no good reason why the court should refuse to permit an oral examination of a witness who has filed an affidavit if it is desired and the witness is in attendance on court. In the bill apoellant states that he would prove by said jurors if he had been permitted to place them on the witness stand, that the State's attorney did say, "they didn't put him on," (referring to defendant). This bill is approved without

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any qualification. In another bill it is shown that defendant's attorneys in their argument stated that defendant had a good reputation, and if so, State's counsel was justified in referring to the fact that he could not attack his reputation unless defendant saw proper to make that an issue, but he was not authorized to refer to the fact that defendant had not testified in the case in this connection.

Another matter we will call attention to is that Dowdle Jackson was not only permitted to testify, giving his reasons why he favored expelling appellant from the Masonic lodge, but also testify to conversations he had with other members of the lodge in regard to the matter. The defendant not being present, these conversations with others about the action of the lodge were inadmissible. In a number of bills are several conversations had by witnesses with other people when defendant was not present. These conversations should not have been admitted. However, it was proper for the court to admit testimony as to where the money was found and that was returned, and by whom found and by whom returned, but it was not permissible for any witness to testify that Cain or any other person had told him it would be returned under named conditions, unless defendant can in some way be connected with such matters.

We do not deem it necessary to discuss the other matters raised in the motion for new trial, for if this opinion is followed they will not occur again.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

GEORGE PIERCE, ALIAS SAM PIERCE, V. STATE.

No. 2284. Decided February 19, 1913.

1.—Occupation—Selling Intoxicating Liquors—Local Option—Continuance.

Where defendant's application for continuance showed, in connection with the record on appeal, that the alleged absent testimony was not probably true and was of an impeaching character, there was no error in overruling the motion. Following Bolton v. State, 43 S. W. Rep., 1010.

2.—Same—Evidence—Practice in District Court.

Where defendant had sought to impeach the State's witness, there was no error to admit testimony in support of the witness, and this can be done at any time before the argument is concluded, under Article 698, Code Criminal Procedure.

3.—Same—Evidence—Bill of Exceptions.

Where defendant complained that the court permitted the introduction of part of his application for a continuance, but the court's qualification showed that this was not true; that only a reference was made thereto in argument, there was no error.

4.—Same—Motion for New Trial—General Objections.

An objection that the verdict is contrary to the law and the evidence only presents the question, that the testimony does not sustain the verdict, for review.

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5.—Same—Remarks by Judge.

Where it appeared on trial that no jury had been empaneled, and it was not shown that anyone who served on the jury heard the remark by the judge to which objection was made, there was no error.

6.—Same—Charge of Court—Occupation—Number of Sales—Harmless Error.

Where the court in his charge instructed the jury that two sales must be proved to have been made within two years instead of three years, in defining as to what constituted pursuing the occupation of selling liquor in local option territory, such error was harmless, the charge being otherwise correct.

7.—Same—Charge of Court—Pursuing Occupation.

Where the charge of the court was not subject to the criticism that it virtuallly instructed the jury that if they believed that the defendant made one sale of intoxicating liquors on either of the said above mentioned dates to find him guilty of the offense of pursuing the occupation, there was no error, when considered as a whole; the jury being r^quired to find at least two sales while he was pursuing such occupation.

8.—Same—Charge of Court—Definition of Occupation.

Where no part of the court's charge authorized the jury to convict defendant of pursuing the business or occupation of making one sale of intoxicating liquors in local territory, but on the whole, instructed the jury that they must find that defendant was engaged in the business or occupation and made at least two sales, there was no error, although the definition of occupation might have been fuller; yet, no requested charge was requested.

9.—Same—Charge of Court—Druggist.

Where there was no evidence that the defendant was a druggist or had license to sell on prescription, and that idea was excluded entirely, the criticism that the court's charge authorized the jury to convict a druggist who sells intoxicating liquors on prescription is wholly untenable.

10.—Same—Charge of Court—Harmless Error.

Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the court erroneously instructed the jury that in case of a reasonable doubt, they might convict defendant for a violation of the local option law if he made one sale under it, and which subjected him to a fine and confinement in the county jail, the error was harmless, as he was not convicted of that offense and the same is entirely distinct from the one for which he was tried and convicted.

11.—Same—Law In Force—Waiver.

Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the defendant waived the reading of the orders of the Commissioners Court pertaining to local option being in force in the county of the prosecution and admitted their introduction in evidence, he could not claim, in his motion for rehearing in this court, that there was no evidence to show that local option was in force in said county; especially, where the court's charge assumed such fact and no objection was made thereto in motion for new trial.

Appeal from the District Court of Newton. Tried below before the Hon. W. B. Powell.

Appeal from a conviction of unlawfully pursuing the occupation of selling intoxicating liquors in local option territory; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Forse & Wigley, for appellant.—On question of continuance: Lopez v. State, 52 Tex. Crim. Rep., 226, 106 S. W. Rep., 336; Presley v.

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State, 60 Tex. Crim. Rep., 102, 131 S. W. Rep., 332; Roquemore v. State, 54 Tex. Crim. Rep., 592, 114 S. W. Rep., 140.

On question of law in force: Ellis v. State, 59 Tex. Crim. Rep., 630, 130 S. W. Rep., 170.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was prosecuted and convicted of pursuing the occupation of selling intoxicating liquors in prohibition territory.

When the case was called for trial he filed an application for a continuance on account of the absence of Phillip Berren and J. A. Miller, alleging that he could prove, in substance, the same facts by each. The court overruled the application, had additional process issued, and postponed the case until next morning. Miller was found, and attended court, when appellant filed an amended motion, basing it solely on the ground of the absence of Berren. The evidence in the case would disclose that Miller testified and denied each fact that appellant had stated in his application he expected to prove by him. A number of witnesses also testify that the absent witness Berren was not at the place defendant alleged in his application, and when we consider the testimony of the witness Allen we think it hardly probable that the witness would testify that appellant did not sell any whisky to Allen. Allen says he purchased whisky from him on many occasions from October to March. The only allegation is that Berren would testify that appellant did not sell Allen whisky on March 16th and 17th. When no one of the witnesses who testified in the case ever saw Berren at the place where appellant lived and is said to have sold the whisky, and all say he had not been there, we think the court was authorized to find and hold that the testimony was not probably true. The facts stated it was expected to prove by the absent witnesses would only tend to impeach the witness Allen by proving contradictory statements, and it has always been held that a continuance will not be granted to secure testimony solely of an impeaching nature. Bolton v. State, 43 S. W. Rep., 1010, and cases cited in sec. 612, White's Ann. Code of Crim. Procedure.

While the State was offering testimony in rebuttal it introduced J. A. Miller, to whose testimony the objection was made that "it was not in rebuttal of anything offered by defendant." Since the adoption of Article 698 of the Code of Criminal Procedure, it has always been held that the court may allow testimony to be introduced at any time before the argument is concluded, if in the opinion of the court it is necessary to a due administration of justice. The defendant had sought to impeach John Allen, and under such circumstances it would be permissible for the State to support him. Branch's Crim. Law, sec. 874.

Appellant in another bill complains that it was error to permit

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the State to introduce in evidence a part of defendant's first application for a continuance in which he stated: "Defendant expects to prove and will prove by the witness Miller that he heard John Allen state he was telling a lie when he testified in Justice Court that he bought whisky from this defendant," etc. The court states, in approving the bill, that no part of the application for a continuance was admitted in evidence, and the statement of facts signed as agreed to by counsel supports the court in his statement. The court further states that in arguing the admissibility of the testimony of Miller some reference was made to what defendant had contended he could prove by him, and this was the only reference made to it. As it is shown that it was not admitted in evidence, the court did not err in the matter.

Those two bills of exception which complain that the court erred in overruling the motion for new trial (1st) "Because the verdict and judgment rendered herein are contrary to law;" and (2nd) "Because the evidence is not sufficient to sustain the conviction had hereunder, because it does not show that this was defendant's occupation or business," presents no question for review, except that the testimony does not sustain the verdict. The evidence offered by the State amply supports a finding that he was pursuing the business alleged.

Appellant also complains that when this case was called for trial, and he moved to continue the case on account of the absence of the witness Miller, the court remarked "that he also wanted the witness Miller because he wanted to predicate an indictment for perjury on the motion for a continuance." It appears by the qualification of the bill that no jury had been impaneled at this time; that on this application the court postponed the case until the next day, and had process issued for this witness, whose attendance was secured. As the bills show that no jury had been impaneled, and it is not shown that any man who served on the jury heard the remark of the court, or if so that he was objected to on that ground by appellant, this presents no error.

The appellant selects the following paragraph of the court's charge: "Two sales of whisky will not of itself constitute the offense of engaging in or pursuing the occupation or business of selling intoxicating liquor, but before anyone can be convicted who is engaged in or pursuing the occupation or business of selling intoxicating liquors the State must prove at least two sales to one or more persons as alleged in the indictment within two years next preceding the filing of the indictment." One complaint is that the court erred in stating two sales must be proven to have been made within two years; that this is not the law. This is true, but it is more favorable to defendant than is the letter of the law. The Act making pursuing the occupation or business a felony says that at least two sales must be proven to have been made within *three* years, and the court in limiting the time to two years in which the sales could have been proven commit-

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ted an error favorable to defendant, and of which he will not be heard to complain. The complaint that it is upon the weight of the testimony is also a matter of which defendant cannot complain. In telling the jury that "two sales in and of itself will not constitute the offense of engaging in the business," if upon the weight of the testimony, would be as favorable to defendant as the matter could be stated, and the paragraph does not assume that the appellant was engaged in the business or occupation. After giving his and other definitions of the law of the case, the court instructs the jury: "As to whether or not the defendant was engaged in or pursuing the occupation or business of selling intoxicating liquors in violation of law is a question of fact for you to determine under all of the testimony and circumstances in evidence before you," and then submits the issues in the following language:

"Now, Gentlemen of the jury, bearing in mind all of the foregoing instructions of law and the evidence before you, you will consider of your verdict and if you believe beyond a reasonable doubt that the defendant did in Newton County, Texas, on or about the 17th day of December, 1911, and on or about the 22nd day of December, 1911, and on or about the 16th day of March, 1912, and on or about the 17th day of March, 1912, and on or about the 20th day of March, 1912, or on either said days and dates did unlawfully engage in and pursue the occupation and business of selling intoxicating liquors in violation of said law and you further believe beyond a reasonable doubt that he also in said County and State on the 17th day of December, 1911, sell intoxicating liquors to Wm. Cheatham in violation of law and on or about the 22nd day of December, 1911, sell intoxicating liquor to Jim Boyd in violation of law and did on or about the 17th day of March, 1912, sell intoxicating liquors to John Allen, in violation of law and on or about the 20th day of March, 1912, sell intoxicating liquors to John Allen or did make any two of said sales you will find the defendant guilty as charged in the indictment and assess his punishment at confinement in the penitentiary for any time not less than two nor more than five years as you may determine and so say in your verdict."

This latter paragraph is also criticized by appellant, the objection as stated being "that it virtually instructs the jury that if they believe that this defendant made one sale on either or any of the said above mentioned dates they would find him guilty of the offense of pursuing the occupation." The charge is not subject to this criticism. It instructs the jury that they must find first that he was engaged in the business or occupation on given dates and made sales to certain parties, "or did make any two of them." It would have been better to have left out the words "or on either of said days or dates" where they occur in the paragraph, yet when the paragraph as a whole is read, the court informs the jury that at least two sales

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must be proven while defendant was pursuing the business or occupation, and no other inference or deduction could have been drawn from the language used.

The criticism of the paragraph defining occupation or business is on the ground that it "instructed the jury that any person who buys whisky or other intoxicants one time for the purpose of selling it to another, and who does actually sell it to such other, making one sale only, and that sale being the result of one purchase, is guilty of pursuing the occupation," etc. This paragraph is not subject to such construction. In no part of the charge is the jury authorized to convict defendant of the business or occupation on making only one sale, but the charge as a whole instructs the jury that they must find that he was engaged in the business or occupation and made at least two sales. While the definition of "occupation or business" is perhaps not as full as it should have been, it is not objected to on that ground; no special charge is asked, and the objections made present no error. The criticism that it authorizes the jury to "convict a druggist who sells intoxicating liquor on prescription," etc., might have had some foundation if there was any evidence that appellant was a druggist or had license to sell on prescription, but the evidence excludes that idea. It shows that he was running a boarding house at a lumber or logging camp, and there is no suggestion that he had a license, and it has always been the rule of law in this State that an issue not made by the evidence need not be submitted to the jury.

Wm. Cheatham testified that on the 17th day of December he secured a pint of whisky from appellant and paid him ninety cents for it; that he got it at appellant's boarding house in Logtown. Jim Boyd testified that in December he purchased a quart of whisky from appellant at his boarding house, paying him $1.80 for it; that at the time he purchased this quart appellant had five or six quarts on hand that he saw at the place where appellant got him his quart. John Allen testified that he purchased whisky from appellant at his boarding house over a period of time extending from October to March; that he had purchased whisky from appellant at least five or six times during that period; that he could not say how many times he had purchased it; that he paid $1.80 per quart for the whisky. That whenever he wanted whisky he went to appellant at his boarding house and always got it.

Appellant offered no testimony that he did not make these sales, except that he rigidly cross-examined the two witnesses first named, and sought to break down Allen's testimony by cross-examination, and introducing testimony tending to impeach him. We think this testimony would fully support a verdict that appellant was engaged in the business or occupation, and by it it is seen there is no suggestion that "appellant was a druggist selling on prescription."

There is one other criticism of the charge of the court, and it presents error, but is it an error of which appellant can complain, and

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which should cause a reversal of the case? The court instructed the jury: "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of engaging in and pursuing the occupation and business of selling intoxicating liquors in violation of law, then you will acquit him of that offense and consider further of your verdict, and if you believe beyond a reasonable doubt that the defendant did in Newton County, Texas, on or about the time alleged in the indictment make a sale of intoxicating liquor to Wm. Cheatham, Jim Boyd, John Allen or either of them, then you will find the defendant guilty of selling intoxicating liquors in violation of the local option law and assess his punishment at a fine of not less than $25 nor more than $100 and by confinement in the county jail for not less than 20 nor more than 60 days as you may determine and so say in your verdict."

This is not the law, and this paragraph of the charge of the court should not have been given, but it having been given, it but emphasizes the fact that the complaints of the charge that the charge authorized a conviction of defendant for pursuing the occupation if he made one sale, are unfounded. A charge must always be construed as a whole, and when so taken if it fairly presents the law of the case, no error is presented. Under all these instructions the jury convicted appellant of pursuing the occupation or business, and assessed his punishment at confinement in the penitentiary for two years, thus not only finding that appellant made sales to the persons named in the indictment, but that he was also engaged in that business or occupation, for they were specifically told in the charge if they did not find he was engaged in that occupation, to find him guilty of only a misdemeanor, and assess his punishment at a fine, etc. Had the jury found appellant guilty of the latter offense, the verdict could not be sustained, for pursuing the business or occupation and making a single sale are separate and distinct offenses, and are not degrees of the same offense under Article 752 of the Code of Criminal Procedure. They are as much separate and distinct offenses as are theft and burglary, and no one would contend that under an indictment charging theft only a party could be convicted of burglary, nor if burglary alone was charged one could be convicted of theft. So in this case the appellant being charged with offense of pursuing the business or occupation of selling intoxicating liquors, he could not be convicted of the offense of merely making a sale or sales of intoxicating liquors when not pursuing that business or occupation. However, as he was in fact convicted of the offense with which he was charged in the indictment, does the fact that the court in his charge authorized a conviction (if the jury found he was not guilty of the offense charged in the indictment) of an offense not charged in the indictment, when such offense has provided therefor a much less penalty, necessarily result in a reversal of a case. Had he been convicted of the offense not charged in the indictment, there can be no question the case would necessarily be reversed, but having been convicted of

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the offense with which he was charged, could the giving of this paragraph of the charge have been injurious to defendant? Authorizing one to be convicted of a degree of offense not raised by the evidence, where the offense contains degrees, and where the punishment is much less for the degree submitted than that for the offense of which he stands charged, has been frequently held to be an error of which a defendant can not complain, and this even though the defendant is convicted of the lesser degree of the offense. In this case, under the mistaken idea that the offense of selling intoxicating liquors was but a degree of the offense of pursuing the business or occupation of selling intoxicating liquors, the court submitted both offenses, but inasmuch as this charge was favorable to defendant in that it presented clearly and succinctly to the jury that they could not convict defendant of the offense charged for making a sale of intoxicating liquors, but must further find that he was, in making the sales, pursuing that business or occupation, it is such error in this case as is only not harmful to appellant, but really beneficial to him, and as he was found guilty, under such circumstances, of the graver offense, and of the offense really charged in the indictment, the error is harmless, and under such circumstances, under the laws of this State, we are not authorized to reverse the case.

The judgment is affirmed.

Affirmed.

ON REHEARING, MARCH 19, 1913.

HARPER, JUDGE.—Appellant has filed a motion for rehearing presenting only one question, and one that was not presented in appellant's brief, nor in his motion for new trial. In fact it is first suggested by him in this motion for rehearing in this court, and that is: "There is no evidence to show local option was in force in Newton County, nor was it admitted that local option was in force in Newton County." If this is true, it is strange that appellant did not raise that question in the trial of the case, and did not assign as error the part of the charge of the court wherein the court instructed the jury that prohibition was in force in Newton County. Of course, if appellant's contention, even though raised this late, is correct it would be fatal to the conviction, because this court, and no other court, can take judicial notice of those portions of this State in which local option has been adopted, but in the trial of the case it must be proven that local option has been adopted. However, in this record, we think this fact was proven in the trial of the case, and appellant's attempt at this late hour to take advantage of perhaps an inapt expression in the statement of facts showing that fact, will not be allowed. In the statement of facts agreed to by appellant's counsel, it is shown that when the State introduced in evidence the orders of the Commissioners Court showing that local option had been adopted, defendant made the following admission: "Deft. It is admitted that

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the orders pertaining to *local option being in force* be considered read, that is, we waive the reading of the orders."

This clearly shows that the orders were introduced in evidence, and that they showed that local option was in force in that county. In his charge the court instructed the jury: "The orders of the Commissioners Court read before you establishes that the law prohibiting the sale of intoxicating liquors in Newton County, Texas, is in force, and that said law is now and was at the time of the alleged sales in force and that it was unlawful to make sales, if any were made, as alleged."

As stated herein before, appellant in his motion for new trial, made no complaint of this paragraph of the court's charge, and in said motion there is no allegation that this fact had not been proven, and in the brief filed in this court there was no such contention, and it is first attempted to be raised in a motion for rehearing in this court.

Defendant having made the admission and statement the record shows he made in the court below, will not now be heard to complain that the record is not more explicit.

The motion for rehearing is overruled.

Overruled.

Ex Parte W. M. Andrus.

No. 2318. Decided January 22, 1913.

Rehearing denied February 19, 1913.

1.—Habeas Corpus—Jurisdiction—Practice on Appeal.

It is necessary under the statute that a trial for bail, after indictment found be heard in the county where the homicide occured and where the indictment is found; and where a district judge had granted a writ of habeas corpus in a case in which there was a change of venue, the writ is returnable to the county in which the indictment was found. But an original application to this Court will be heard.

2.—Same—Denial of Bail.

Where the proof is evident in a capital case, the relator is not entitled to bail.

Appeal from the District Court of Fayette. Tried below before the Hon. Frank Roberts.

Appeal from a habeas corpus proceedings denying relator bail which was dismissed for want of jurisdiction, and relator heard on original application to this court.

The opinion states the case.

Lane, Wolters & Storey and *Jno. C. Williams & Henry Kahn,* for relator.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, Judge.—Applicant was indicted by the grand jury of Fort Bend County, charged with murder. The venue of the case

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was changed to Harris County, when applicant applied to the district judge of Fort Bend County for a writ of habeas corpus, wherein he prayed that he be granted bail. The Hon. Wells Thompson, judge of the District Court of Fort Bend County, declined to grant the writ. It being made to appear that the judge elect of that court was disqualified, having been of counsel for the State in this case, application was made to Hon. Frank S. Roberts, judge of the District Court of Fayette County, who granted the writ as prayed for and made it returnable to Fayette County.

When the cause came on for trial, the State, by her district attorney filed a plea to the jurisdiction of the District Court of Fayette County to hear and determine the matter, and this plea must be sustained. In Ex parte Overcash, 61 Texas Crim. Rep., 67, this question is discussed, and the statute and decisions of this court are quoted.

However, relator filed an application in this court asking that in the event we should hold that the District Court of Fayette County had no jurisdiction in the premises, that inasmuch as the district judge of Fort Bend County is disqualified, this court grant the writ and hear and determine same. Under our Constitution and laws relator is entitled to have the writ granted and a hearing had, and as the district judge of Fort Bend County is disqualified, we have concluded to do so. It further appearing from the record that counsel for relator and the State have waived the issuance of the writ. and agreed that the case might be heard on the agreed statement of facts now on file, we have carefully read same, and are of the opinion, under the evidence before us, the relator is not entitled to bail, and he is remanded to the custody of the sheriff of Harris County.

Bail refused.

[Rehearing denied February 19, 1913.—Reporter.]

S. H. PERRY v. STATE.

No. 2102. Decided January 22, 1913.

Murder — Evidence — Husband and Wife — Cross-examination — Bill of Exceptions—Former Statement—Credibility of Witness.

Where, upon appeal from a conviction of murder in the second degree, the bills of exception with reference to the cross-examination of defendant's wife were of a general character, the same need not be considered; but if the statement of facts were consulted, there was no error in permitting the State, on cross-examination of defendant's wife, who had testified on the trial that deceased was armed, to show that she testified before the justice of the peace that deceased was not armed at the time of the homicide; the State not attempting to introduce her former written statement, but her testimony at the inquest proceedings.

Appeal from the District Court of Grimes. Tried below before the Hon. S. W. Dean.

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Appeal from a conviction of murder in the second degree; penalty, ten years imprisonment in the penitentiary.

The opinion states the case.

T. C. and T. P. Buffington, for appellant.—On question of introducing statement of defendant's wife at inquest proceedings: Green v. State, 60 Texas Crim. Rep., 530, 132 S. W. Rep., 806; Dowd v. State, 52 Texas Crim. Rep., 563, 108 S. W. Rep., 389; Stewart v. State, 52 Texas Crim. Rep., 273, 106 S. W. Rep., 685; Dobbs v. State, 54 Texas Crim. Rep., 579, 113 S. W. Rep., 921; Spivey v. State, 77 S. W. Rep., 444.

C. E. Lane, Assistant Attorney-General, and *Dean-Humphrey & Powell,* for the State.—On question of introducing statement of defendant's wife before inquest: Hawn v. State, 13 Texas Crim. App., 383; Cheatham v. Riddle, 8 Texas, 161.

PRENDERGAST, JUDGE.—Appellant appeals from a conviction for murder in the second degree with a penalty of ten years in the penitentiary.

The only questions presented for review are as to the examination of appellant's wife on cross-examination by the State, she having been introduced as a witness by appellant; and the proof of what she testified before the justice of the peace when he held an inquest over the body of the deceased. The questions are all raised by appellant's four bills of exceptions. The first of these is as follows:

"Be it remembered that on the trial of the above numbered entitled cause the State was permitted to prove by the witness, S. E. Rhodes, a witness for the State, that Mrs. Perry, the wife of the defendant, who had testified in behalf of the defendant on said trial, had made a written statement at the inquest over Boney, with whose murder her husband was charged, which written statement contradicted her testimony on the trial of her said husband." The balance of this bill is the mere objections and is not approved by the court as a statement of the facts.

The second bill complains that "the State was permitted to prove by the witness, John Grissett, a witness for the State, that Mrs. Perry, the wife of the defendant, who had testified in behalf of the defendant on the trial of said cause, had made a written statement at the inquest over Boney, with whose murder her husband was charged, which written statement contradicted her testimony on the trial of her said husband." The balance of this bill is the mere objections, not approved as a statement of the facts by the court.

The next bill complains that "the court permitted the witness, S. E. Rhodes, over the objection of the defendant, to testify that the wife of the defendant, Mrs. Perry, who had testified for the defendant in said trial, had made a written statement at the inquest held over

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Boney, with whose murder the defendant stands charged, and for whose murder he was then on trial, and that in said statement she had testified that Boney was unarmed at the time he was shot and killed by her said husband." The balance of the bill is the mere objections of appellant to this testimony.

The other bill is substantially the same as the last just above, except that it is to the testimony of the witness Grissett. In approving these last two bills the court explained that this tesimony was introduced solely for impeachment purposes.

Each and all of these bills, under all of the authorities, are too general to require this court to consider either of them. If we could go to the record we would find that appellant introduced his wife as a witness in his behalf, who gave material testimony for him and directly against the State in contradiction of the testimony introduced by the State by other witnesses and that, among other things, she testified on this trial that the deceased, Boney, was armed and had his gun with him at the time her husband killed the deceased, and that she was asked specifically on cross-examination by the State on this point; that while she testified before the justice of the peace at the inquest the day her husband killed Boney and denied then swearing that Boney did not have any weapons of any kind, that she saw, when her husband killed him, and that she did not swear on that occasion that Boney did not have a thing that she saw when her husband shot him, and that John Grissett was not present, and that she did not so swear before the justice of the peace in John Grissett's presence; that the State was then permitted to introduce Rhodes, the said justice of the peace, and he testified on the inquest she swore that she saw the killing and that Boney, the deceased, did not have any weapon of any kind that she saw at the time of the killing. And permitted John Grissett to swear that he was present when she testified before the justice of the peace on the day Boney was killed and that in his presence and hearing she stated to the justice of the peace that if Boney had any weapon of any kind at the time he was killed she did not see it. That this testimony by Rhodes and Grissett in impeachment of appellant's wife was admissible, there can be no question.

While it was shown that at this inquest Mrs. Perry testified before the justice of the peace and he wrote down and she signed her testimony at the time and it was further sufficiently shown that this written testimony of hers had been lost and could not be found, yet, the State did not attempt to prove the contents of such written statement. What the State did prove in contradiction of her testimony was not what the written statement contained but that she so testified before him on said inquest proceedings. The record does not disclose at whose instance she testified on this inquest proceeding, whether introduced by the appellant or by the State. No objection was made by appellant when the State, on this trial, in its cross-examination, asked her if she had not so testified as shown by the justice of the peace and Gris-

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sett on the inquest proceeding. None of these bills and no assignment of appellant, based thereon, show any reversible error whatever.

These are the only things presented by appellant in his assignments and the judgment will be affirmed.

Affirmed.

BILL MAYHEW V. STATE.

No. 2142. Decided January 22, 1913.

1.—Murder—Regular Term—Special Term.

Where the various orders entered by the judge designated a special session or special term of the District Court as a part of the regular term of the court, such recitation in the orders could not, and did not, change the legal effect and the effect in fact that the term called was a special term, and that the orders made therein were made at a special term or session of the court.

2.—Same—Case Stated—Special Term of District Court.

Where the order of the judge was that the District Court convene in special session at a certain place and time, it showed without question that the judge convened the said District Court in special session, and the fact that said time at which he convened said special session embraced part of the time fixed by law at which the regular term of said court could have been continued and held, cannot and did not make any difference so far as effecting the validity of said special term of the court and the orders made therein.

3.—Same—Regular and Special Term—Order Concerning Term.

Even if it be conceded, and the orders of the district judge could be construed to mean, that said special term of the District Court so called and convened was intended to be a part of the regular term of said court, it could have no such effect as to render the term of the court illegal and would not be a regular term of the court, but a special term. Davidson, Presiding Judge, dissenting.

4.—Same—Special Term—Change of Venue—Notice.

Under the law as it now stands, a special term of the District Court can be convened for the purpose of entering any order that could be entered at a regular term thereof, and no notice or publication thereof is now required by law. See opinion for discussion of the history of the legislation on this subject.

5.—Same—Special Term of District Court—Notice—Repeal.

By the Revised Statutes of 1911, Section 4, repealing clause of the final title of said Revised Statutes, under the general provisions, all civil statutes of a general nature in force when said Revised Statutes took effect and which are not included therein and which are not thereby expressly continued in force, are thereby repealed, and this repealed all those articles of the Revised Statutes of 1895, which required previous notice of the time and publication, convening the District Court in special session; and no notice is now required.

6.—Same—District Court—District Judge—Special Term—Change of Venue.

The law now is that no noticé whatever of thirty days or any other time is required to be given and published of the convening of any special term of the District Court, and the district judge at such special term can make any order that he could make at any regular term of the court, including that of changing the venue in a case, whether he transact any other business or not. Following Ex Parte Martinez, 66 Texas Crim. Rep., 1, and other cases.

7.—Same—Court of Civil Appeals—Statute Construed.

The case of Jowell v. Coffee, 132 S. W. Rep., 886, Court of Civ. App., with reference to requiring thirty days notice of special term of District Court, can have no application as the law now stands, and since the adoption of the Re-

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vised Statutes of 1911, expressly repealing Articles 1114-1116, inclusive of the Revised Statutes of 1895, which required notice, etc.

8.—Same—Change of Venue—Appeal Pending—Mandate—Judicial Knowledge.

This court judicially knows that the former appeal in this case was decided and the cause reversed and no motion for rehearing made at the time the lower court called a special term of the District Court to change the venue of such case; that the mandate was issued and sent to the lower court and must have been filed prior to the convening of said special term, therefore, said trial court had power and jurisdiction to change the venue in such case in said special session; besides, no order with reference to said case was made at the time of calling and convening said special session. Davidson, Presiding Judge, dissenting.

9.—Same—District Judge—Change of Venue—Statutes Construed.

Under Article 626, Code Criminal Procedure, the district judge of his own motion has the right to change the venue of a criminal case, and unless he abuses his discretion, the Appellate Court will not interfere. Following Bohannon v. State, 14 Texas Crim. App. 271, and other cases.

10.—Same—Case Stated—Change of Venue.

Where the record on appeal showed that the District Judge who changed the venue on his own motion was familiar with all the facts and conditions surrounding the case, and under the sanction of his official oath reached the conclusion that a trial alike fair and impartial to the State and to the defendant could not be had in the county of the prosecution, his action in changing the venue of the case was not arbitrary, although witnesses were introduced who testified that a fair trial could be had.

11.—Same—Evidence—Res Gestae—Acts of Third Parties.

Where the acts of a third party were clearly a part of the res gestae occurring within a few seconds after the defendant stabbed the deceased, and that the defendant, at the time, was standing within a few feet from said third party at the time, there was no reversible error; besides, the bill of exceptions was defective.

12.—Same—Evidence—Mental Condition of Defendant—Res Gestae.

Where rejected testimony as to the mental condition of defendant was clearly no part of the res gestae, there was no error.

13.—Same—Evidence—Motive—Third Parties.

Upon trial of murder, there was no error in permitting the State to cross-examine defendant's witness to show motive on the part of defendant, and also the acts of defendant and other parties immediately preceding the homicide.

14.—Same—Evidence—Contradicting Witness—General Reputation.

Where the State sought to contradict defendant's witness, but not to attack his general reputation for truth and veracity, there was no error in not permitting defendant to introduce testimony of the general reputation of said witness.

15.—Same—Remarks by Judge.

Where the remarks by the trial judge to the jury before they were discharged as to statements which they might make to defendant's counsel were harmless, and no injury was shown to defendant by reason thereof, there was no error.

16.—Same—Evidence—Threats.

Where defendant objected to certain testimony of threats by defendant against deceased, but the bill of exceptions itself showed that such threats were made, there was no error.

17.—Same—Charge of Court—Requested Charges.

Where no reason is assigned in the motion for new trial why the requested charges should have been given, there was no error. Following Ryan v. State, 64 Texas Crim. Rep., 628, and other cases.

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Appeal from the District Court of Shackelford. Tried below before the Hon. Thomas L. Blanton.

Appeal from a conviction of manslaughter; penalty, three years imprisonment in the penitentiary.

The opinion states the case.

Scott & Brelesford and *W. L. Grogan* and *J. J. Butts,* for appellant.—On the question of change of venue, jurisdiction and special term: Jowell v. Coffee, 132 S. W. Rep., 886; People v. Riley, 16 Cal., 186; Toler v. Com., 23 S. W. Rep., 347; Flannagan v. Borg, 64 Minn., 394; Reames v. Kearn (Tenn.), 5 Cold., 217, 11 Cyc., 1131.

On question of not permitting testimony of mental condition of defendant: McGee v. State, 19 S. W. Rep., 764; Bronson v. State, 59 Tex. Crim. Rep., 17, 127 S. W. Rep., 175.

On question of not permitting testimony of general reputation of witness: Graham v. State, 57 Tex. Crim. Rep., 104, 123 S. W. Rep., 691; Alberson v. State, 54 Tex. Crim. Rep., 8, 111 S. W. Rep., 738; Brown v. State, 52 Tex. Crim. Rep., 267, 106 S. W. Rep., 368.

On question of refusing special charges on threats: Lee v. State, 55 Tex. Crim. Rep., 379, 116 S. W. Rep., 1153; Evans v. State, 55 Tex. Crim. Rep., 450, 117 S. W. Rep., 167; Snell v. State, 56 Tex. Crim. Rep., 246, 119 S. W. Rep., 852.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—Appellant was indicted for murder in Eastland County, Texas. In the first trial of the case in that county there was a hung jury. On the second trial appellant was convicted of murder in the second degree. He appealed from that trial, and this court, on February 7, 1912, reversed that judgment. The case is reported in 65 Tex. Crim. Rep., 290, 144 S. W. 229.

The regular term prescribed by law for holding the District Court in Eastland County fixed the time for the term to begin on the first Monday in January and that it could continue for eight weeks. The first day of January, 1912, was on Monday; so that the eight weeks which said court was authorized to be held could continue at least until midnight of February 24, 1912. On January 31, 1912, the business of the term apparently having been disposed of, the district judge had entered in the minutes of said court the following: "The above and foregoing minutes embraced on and between pages 430 to 458 hereof, being read in open court and found correct, are hereby approved as a part of the minutes for the January term, 1912, of this court. Witness my hand this, the 31st day of January, A. D. 1912.

"Thomas L. Blanton,
Judge 42nd Judicial District of Texas."

"Attest: Joe Burkett, Clerk."

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And then it seems adjourned the January term of said court.

Presiding Judge Davidson has prepared an opinion herein by which he holds that this conviction must be set aside and the cause reversed and the venue ordered changed back from Shackelford County, where this trial occurred, to Eastland County, on two grounds:

First, that the special term of court of Eastland County called by Judge Blanton, the judge of the district embracing Eastland County, at which the venue of this case was changed from Eastland to Shackelford County, was not a special term of that court convened by the judge, but that it was an attempt to reopen the regular January term of said court, which he holds could not be done.

Second, that the order changing the venue from Eastland to Shackelford County is void, because the order convening the District Court of Eastland County in a special term, or the attempt to reconvene the regular January term, was made pending the appeal of this case in this court and before the mandate from this court reached the lower court.

As we could not agree with him on either of said propositions and as the writer had to prepare an opinion in the Will Drake case, a companion case to this, on the same questions, the duty of preparing the opinion in this case was, therefore, devolved upon the writer hereof.

On February 12, 1912, Julge Blanton, the judge of the 42nd Judicial District of Texas, which embraces Eastland County, made and had entered in the minutes of said court on February 14, 1912, the following order convening the said court in special session:

"IN THE DISTRICT COURT OF EASTLAND COUNTY, TEXAS.

"During Regular Time of January Term, 1912.

"It appearing to the court that the regular term of the January term, 1912, of the District Court of Eastland County, Texas, convened on the first day of January, A. D. 1912, and by law could continue for eight weeks, or until and including the 25th day of February, but that because all business then on the docket subject to trial had been disposed of on the 31st day of January, 1912, court then adjourned; and it further appearing to the court that since said adjournment, the cases of No. 2540, the State of Texas vs. Bill Mayhew and No. 2666, the State of Texas vs. Will Drake, have been reversed by the Court of Criminal Appeals, and that the mandates in same will have been duly returned to this court by the time hereinafter mentioned; and it further appearing to the court that the said Will Drake is now in jail without bond and that he is now entitled to bail; and it further appearing to the court that a necessity will exist for transferring said two cases on a change of venue to another county, and that unless such orders are made during the regular eight weeks

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allowed by law for said January term, 1912, said two cases will have to lie over until the next regular term of court, six months hence, thus depriving both the defendants and the State of a speedy trial. It is therefore ordered that said District Court of Eastland County, Texas, convene in special session at the courthouse of Eastland, on the 24th day of February, A. D. 1912, at 8:30 o'clock a. m. to resume business under the regular January Term, 1912, of said court, and during such regular term time, and only for the purpose of disposing of said two cases above mentioned, at which time the said two defendants, Bill Mayhew and Will Drake, are hereby notified to be present before this court, and the clerk hereof is to spread this order upon the minutes of this court and issue and have precept and copy of this order served upon Messrs. H. P. Brelsford and J. J. Butts at once and copy published in the Eastland Chronicle, done this February 12th, 1912. "Thomas L. Blanton,

"Judge 42nd Judicial District of Texas."

In accordance with said order Judge Blanton appeared at the time and place fixed therein, had the court duly opened and the minutes show as follows:

"Be it remembered that on this the 24th day of February, A. D. 1912, of the District Court of Eastland County, Texas, by order of this court, made on February 12th, 1912, the Hon. District Court of Eastland County, Texas, was again convened, there being present and presiding, Thomas L. Blanton, judge of the 42nd Judicial District of Texas and the following officers, viz.: Hon. W. L. Morris, district attorney; E. P. Kilborn, sheriff; Joe Burkett, clerk, when the following proceedings were had and entered of record, to-wit:

"The State of Texas vs. Bill Mayhew } No. 2540. January term, 1912, of the District Court of Eastland County, Texas.

"February 24th, 1912.

"On this day this cause coming on to be heard on the question of the change of venue of said cause to some other county; and thereupon came on to be heard the defendant's plea to the jurisdiction of this court, to at this time, make and enter an order or judgment changing the venue of said cause and transferring same to some other county for trial and the court having heard and considered said plea and being fully advised in the premises is of the opinion that said plea is not well taken and that this court has jurisdiction to make and enter said order so changing the venue of said cause, it is therefore considered, ordered and adjudged by the court that said plea be and the same is hereby overruled, to which said order and judgment the defendant in open court then and there duly excepted."

The said plea to the jurisdiction of the court in the order just above

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referred to is quite lengthy. It is unnecessary to copy it in full. In it appellant sets up and contends: "This court has not jurisdiction, power or authority to make and enter a valid order or judgment changing the venue of this cause from the District Court of Eastland County, to the District Court of any other county in the State of Texas, for this:

"1. It appears from the order of the judge convening of the *special term* of the District Court in and for Eastland County, Texas, a certified copy of which is hereto attached and made a part hereof and reference thereunto made:

"(a) That this is a *special term* of said District Court in and for said district. * * *

"(d) That said order on its face shows that said *special term* was (not) convened for the purpose of trying any cases on the docket of said court; nor for the purpose of inquiring into any violation of any criminal law of the State of Texas, occurring subsequently to the adjournment of the regular term of the District Court in and for said Eastland County, nor for the purpose of transacting any business or engaging in any proceedings or doing aught else contemplated by, or provided in, the statute law of the State of Texas authorizing the convening of the *special term* of the District Court; * * *

"(g) Said order, when considered in connection with the laws of the State of Texas providing for the holding of courts in the 42nd Judicial District in said State of Texas, shows that this cause should not be tried and disposed of at this *special term* of this court, because the empaneling of no petit jury is provided for * * * nor in the order of the judge convening this court in *special term* and because this is a *special term* of a district court in and for the said County of Eastland, could not remain in session longer than 12 o'clock a. m. on this date, because, etc. * * *

"2. That no notice of the time and place of the convening of said *special term* of this court have been issued by the clerk of the District Court in and for Eastland County, Texas, nor published by the sheriff of Eastland County as required by law.

"3. Because the law authorizing and providing for the convening and holding of *special terms* of the District Court does not authorize the convening of said court in *special term,* nor the holding of *special terms* thereof, merely and solely for the purpose of changing the venue of cases of the docket thereof, or that may be pending therein." (Italics ours.)

It is useless to copy any more of appellant's said plea. What we have copied above was done for the purpose of showing that the appellant and his attorneys contended only and solely that said term of court at which the venue in this case was changed was a *special term* and not the regular term of said court provided by law and no part thereof. The whole motion throughout, in every particular, so states it to be a *special term,* so claims it to be a *special term*, and

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all of the objections made thereto are because it is a *special term* and not the regular term and no part of the regular term.

Then, in addition to this, the appellant took a bill of exceptions to the action, ruling and judgment of the court overruling his said plea to the jurisdiction on the grounds stated therein, restating as his objections thereto substantially the same grounds on which he had made it, contending, throughout in his objections, that the said term of court was a *special term* thereof and only a *special term* and not the regular term and no part of the regular term. It is unnecessary to repeat by quotation his exceptions in his bill of exceptions, for they are merely a repetition of his contentions in the said motion or plea itself. It might be added that the order of the court convening the court, also states it is a special term.

When the said term of court was thus convened in special session in strict conformity to and in obedience to said order, above copied, convening it, the appellant appeared therein, in open court in person and all of his attorneys so appeared therein in open court.

It seems that the district judge, after making his order convening the said District Court in *special session*, because of the fact that the time at which he convened it was within the period of time through which the regular term could have been held, undertook to treat it and designated it in his orders made on February 24, 1912, as a part of the said regular term of the court.

The recitations in these various orders wherein the judge may have designated the convening of said court in *special term* or session as a part of the *regular January term* of the court can not change and does not change the legal effect and the effect in fact of the orders that were made, and that the same was a *special term* or session of the court. In the very order convening the court, after the recitations, and the only order that is made therein is in this language: "It is, therefore, ordered that the said District Court of Eastland County, Texas, convene in special session at the courthouse in Eastland on the 24th day of February, A. D. 1912, at 8:30 o'clock a. m." This shows, without question and without doubt that he was convening and did convene the said District Court in special session; that said time at which he convened said special session embraced part of the time fixed by law at which the regular term of said court could have been continued and held, can not and does not make any difference so far as affecting the validity of said special term of the court and the orders made at that time are concerned. Even if it be conceded, and said orders could be construed to mean, that said special term of the court so called and convened was intended to be a part of the regular January term of said court, it could have no such effect as to render the term of the court illegal. And as we see it, by no show of reason can it be claimed that if it was so attempted to be, or actually, so designated, it would be a regular term of the court or any part thereof.

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As to appellant's various grounds of objection to the convening of said court in special session and that it could not be held and convened in special session, solely for the purpose of entering an order changing the venue and that a special term could not be convened for any purpose, without giving the thirty days notice and publication thereof as formerly required by the law, we think they can in no event be maintained.

We think the history of the legislation of this State on this subject clearly demonstrates that no notice, or publication thereof, is now required by the laws of this State, and that a special term of the District Court can be convened for the purpose of entering any order that could be entered at a regular term thereof. It is unnecessary to here detail the history of this legislation, other than to state, that prior to our Constitution of 1876, no special term of the District Court could be held or called for any purpose, under previous constitutions. In order that there should be no question that a special term would be entirely legal it was expressly provided for in our Constitution of 1876, Section 7, Article 5. The Legislature, soon after our present Constitution was adopted, provided for special terms of the District Court, but it required the order therefor to be made during the regular term while in session and the thirty days' notice and publication thereof before a special term could be held. Then afterwards it passed an Act in 1905, providing for the convening of the court in special term without fixing any time for notice and publication thereof, and without the court then being in session at a regular term; but by the terms of section 5 of that Act certain provisions of the Revised Statutes of 1895 were not repealed, and there was some doubt entertained, whether or not a special term could be called under that Act of the Legislature without giving the thirty days notice. This court has held, in construing that Act in connection with the Revised Statutes of 1895, that no notice and no publication thereof was necessary; but whatever doubt there may have been before the Revised Statutes of 1911 were adopted, there can be none since.

The thirty-second Legislature, at its regular session of 1911, passed an act adopting the Revised Civil Statutes of the State of Texas, which was approved by the Governor on April 1, 1911, by the terms of which the said Revised Statutes became effective September 1, 1911. By the Revised Statutes of 1911 the Legislature re-enacted substantially Articles 1111 and 1112 of the R. S. of 1895, which are now Articles 1718 and 1719, respectively, in precisely the same language as in the Revised Statutes of 1895. These two articles provide for holding the regular terms of court. But instead of re-enacting any of the other articles in Chapter 4, Title 28 of the Revised Statutes of 1895, which required in certain contingencies thirty days notice and the publication thereof in convening special terms of the District Court, enacted, or re-enacted the following articles in said chapter:

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"Art. 1720. Whenever it may become advisable, in the opinion of a district judge, to hold a special or terms of the District Court in any county in his district, such special term or terms may be held; and such district judge may convene such special term at any time which may be fixed by him. Such district judge may appoint jury commissioners, who may select and draw grand and petit jurors in accordance with the law. Such jurors may be summoned to appear before such district court at such time as may be designated by the judge thereof; provided, that in the discretion of the district judge, a grand jury need not be drawn or impaneled.

"Art. 1721. The grand jury selected, as provided for in the last preceding article, shall be duly impaneled, and shall proceed to the discharge of its duties at a regular term of the district court.

"Art. 1722. Any person indicted by the grand jury impaneled at a special term of the district court may be placed upon trial at such special term.

"Art. 1723. No new civil cases can be brought to a special term of the district court.

"Art. 1724. The juries for any special term shall be summoned in accordance with the law regulating juries at regular terms of court; and at any special term all proceedings may be had in any case which could be had at any regular term of such court; and all process issued to a previous regular term or to such special term, and all orders, judgments and decrees, and all proceedings had in any case, criminal or civil, which would be lawful if had at a regular term, shall have the same force and effect; and any proceeding had may be appealed from under the same rules, regulations and limitations as provided for in appeals from regular terms of court.

"Art. 1725. Should the judge of any District Court not appear at the time appointed for holding the same, and should no election of a special judge be had, the sheriff of the county, or in his default any constable of the county, shall adjourn the court from day to day for three days; and if the judge should not appear on the morning of the fourth day, and should no special judge have been elected, the sheriff or constable, as the case may be, shall adjourn the court until the next regular term thereof.

"Art. 1726. Whenever any District Court shall be in the midst of the trial of any cause when the time for the expiration of the term of said court, as fixed by law, shall arrive, the judge presiding shall have the power and may, if he deems it expedient, extend the term of said court until the conclusion of such pending trial. In such case, the extension of such term shall be shown in the minutes of the court before they are signed. In case of the extension of the term of court, as herein provided, no term of court shall fail because thereof in any other county, but the term of court therein may be opened and held as now provided by law, when the district judge fails to appear

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at the opening of a term of court." (These articles with 1718 (1111) and 1719 (1112) are all of our statutory provision on both regular and special terms of the District Courts.)

Then in section 4, repealing clause of the Final Title of said Revised statutes of 1911, under the general provisions enacted as follows: "Sec. 4. That all civil statutes of a general nature, in force when the Revised Statutes take effect, and which are not included herein, or which are not hereby expressly continued in force, are hereby repealed."

So that, without question and without doubt, long before the said District Court of Eastland County was convened in special session under the terms of Judge Blanton's order, copied above, all those articles of the Revised Statutes of 1895, which required previous notice of the time and publication, convening the District Court in special session, were expressly repealed by the Legislature.

In our opinion, therefore, there can be no doubt but that no notice whatever, and no thirty days time, or any other time, is required to be given and published of the convening of any speical term of the District Court in this State, and in our opinion the district judge can make any order at any special term of the District Court that he could make at any regular term of the court, and, hence, that he could make the order changing the venue in this case which would be perfectly valid whether he transacted any other business at said special term or not. Ex parte Martinez, 66 Tex. Crim. Rep., 1, 145 S. W. Rep., 959; Ex parte Boyd, 50 Texas Crim. Rep., 309; McIntosh vs. State, 56 Texas Crim. Rep., 134; Ex parte Young, 49 Texas Crim. Rep., 536.

Appellant in his brief cites us to Jowell v. Coffee, 132 S. W. Rep., 886, wherein the Court of Civil Appeals at Fort Worth in a civil case on October 29, 1910, held that the said Act of the twenty-ninth Legislature of 1905, p. 116, did not repeal the said articles of the Revised Statutes of 1895, requiring thirty days notice and the publication thereof as a prerequisite to a valid special term. Whether that decision is correct or not is unnecessary for us to determine, because we apprehend that neither that court nor any other of the Courts of Civil Appeals, nor the Supreme Court, would now hold since the adoption of the Revised Statutes of 1911, and the express repeal of Articles 1114 to 1116, inclusive of the 1895 Revised Statutes, which required notice, publication, etc., that any thirty days notice or any other time was necessary to be given and published as a prerequisite to the legally convening of a District Court in special term. As the Revised Statutes now are the case of Jowell v. Coffee, supra, has no application.

We can not understand how it can be contended from this record that the order of the court changing the venue in this case from Eastland to Shackelford County is void because this case was pending on appeal here when the said order convening the District Court of

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Eastland County in special session, was made. We judicially know that the former appeal in this case was decided and this cause reversed on February 7, 1912; that no motion for rehearing was made in this court; that the mandate in this case on the former appeal was actually issued from this sourt and sent to the lower court on February 19, 1912. The order of February 12, 1912, by Judge Blanton convening the District Court of Eastland County, made no order whatever in this case. It did not pretend to make any order therein as an inspection of it will show. It specifically recites, as one of the facts, that this case had been reversed "and that the mandate in the same would have been duly returned to this court by the time hereinafter mentioned," which time hereinafter mentioned was, as the order shows, February 24, 1912. And further said order recites as a fact that said court was convened in special session on February 24, 1912, "only for the purpose of disposing of said two cases above mentioned." Clearly and unquestionably the order convening said court in special session in no way then made any order whatever in this case, but provided for the convening of the court so that on February 24, 1912, an order could, and would then be made.

Then the order of said court made and entered at said special term in open court on February 24, 1912, is as follows:

"Now on this the 24th day of February, 1912, during the 8th week of the regular time allotted by law for holding the regular term 1912 of the District Court of Eastland County, Texas, court having been regularly convened by previous order of this court entered upon the minutes, and opened by call of the sheriff, above case was duly called when appeared the defendant, Bill Mayhew, both personally and by his attorneys or record, and it appearing to the court this case has been twice before been tried in this county, at each of which trials there was a large crowd of people from different portions of the County, the courtroom being crowded both on the lower floor and in the gallery the first trial resulted in a hung jury and the second trial which was had on January 11, 1910 resulting in a conviction, since which time this case has been in the Court of Criminal Appeals until recently when the mandate was returned into this court; and it further appearing to the court that this is the last day (it being Saturday, February 24, 1912) upon which business may be transacted during the regular January term, A. D. 1912, of the District Court of Eastland County, Texas, and that unless this case is transferred to some other county for trial both the State and the defendant will be deprived of a speedy trial as this case will then have to go over until the next regular term of this court which meets in July, as the regular term of the District Court of Taylor County will convene next Monday, February 26, 1912; and it further appearing to the court that because of the prominence of both the defendant and the deceased, and their many friends, and the notoriety given this cause by the two for-

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mer trials and the results thereof, it will be difficult to obtain another jury that would be fairly impartial, alike to the State and the defendant, it is the opinion of the court, on his own motion that this case should be transferred to another county. And court meeting in Albany, of Shackelford County, before it meets either in Stephens or Callahan Counties it is ordered and adjudged and decreed by the court that the venue of this case be and the same is hereby changed from the District Court of Eastland County, Texas to the District Court of Shackelford County, Texas, to be tried at the courthouse in Albany, Texas, on Tuesday, April 16, 1912, at 8:30 o'clock a. m., the defendant having heretofore been duly arraigned on the indictment charging him with murder and his plea of not guilty having heretofore been entered of record and all of his special pleas having been heard and determined."

Then the order further directs all witnesses to appear at Albany, in Shackelford County, at the time set for the trial of said case, fixes the amount of the bond of the appellant and shows that he entered into recognizance to appear in Shackelford County at the time and place fixed in said order. It is unnecessary to copy that part of said order. An inspection of the order of the change of venue, just above copied, will show that it specifically states that the mandate from this court to that court had been returned into that court. The mandate having issued from this court on February 19th, we know, as reasonable men, that two days time would unquestionably be ample time for the mandate to reach that court from this, and while the specific date on which it was filed in that court is not made to appear, there can be no question whatever but that it had reached that court and been filed therein before February 24, 1912, the date of the convening of said court in special term and the making of the order changing the venue therein. Again, the judge in approving appellant's lengthy bill of exception to the said order changing the venue, specifically states in explanation and qualification thereof, that the mandate was returned into that court from this court. Again, appellant's able and skillful attorneys in no way, and nowhere, claim, or intimate, that the mandate had not been returned from this court and filed therein at and before the time the order changing the venue was made. Certainly, if such had been the fact they would in some way, somewhere, have raised the question and there can be no doubt but that if they had, the district judge would have sustained the point and made no order, and would not have violated that provision of the statute to the effect that while the cause is pending in this court the lower court has no authority or right whatever to make any order therein.

So that, in our opinion, all that portion of Presiding Judge Davidson's opinion contending that the order changing the venue was void, because the lower court had no jurisdiction on account of the order being made before the mandate was returned and filed therein, has

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no application whatever to this case, and it is, therefore, unnecessary for us to further notice that point.

This brings us to the question of the right of the district judge of his own motion to change the venue from Eastland to Shackelford County. In support of appellant's plea to the jurisdiction and his resisting that order changing the venue, he introduced several witnesses whose testimony in the most favorable light for appellant would be construed to tend to show that there was no necessity for such change. The State introduced no testimony on the subject. The court was acting and did act, in changing venue, on his own motion, as he had the right to do. It is unnecessary to recite the evidence of appellant's witnesses on this point. A careful consideration of it all is summed up in the fact that their testimony tends to show that in *their opinion* a jury to try this case could be procured in Eastland County. It all shows, however, that the deceased and the appellant's family, especially, were prominent people in that county; that the killing of deceased excited a great deal of interest and much more than usual at the time; that the families of these parties were influential; that the newspapers all over the county had had more or less to say about the killing. That two trials of the appellant had already been had in that county, and it is evident, especially on the second trial, trouble was had in securing a jury; that a great many people from the different portions of the county had attended both trials, and a great deal of interest was taken all over the county, by the people thereof.

The Legislature has expressly given the judges of the District Courts specific and ample authority and power, of their own motions, to change the venue in any case. Article 626, Code Criminal Procedure, is: "Whenever in any case of felony the district judge presiding shall be satisfied that a trial, alike fair and impartial to the accused and to the State can not, from any cause, be had in the county in which the case is pending, he may, upon his own motion, order a change of venue to any county in his own, or in an adjoining district, stating in his order the grounds for such change of venue." This court has repeatedly construed and discussed this article of the procedure. It is unnecessary to cite all of the cases thereon. In Bohannon v. State, 14 Texas Crim. App., 271, this court, through Judge Willson, said: "We are of the opinion, and so hold, in accordance with the former decisions of this court, that under Article (576) 626 of the Code of Criminal Procedure, which we have quoted, the judge had the authority, of his own motion, to send this case for trial to Austin County. He was clothed with this discretion by the express and unqualified words of the law, and this law was enacted under the express sanction of the Constitution. (Const., art. 3, sec. 45.) It is true that this discretion is a judicial, and not a personal one (Walker v. The State, 42 Texas, 360; Dupree v. The State, 2 Texas Crim. App., 613); yet, it being a discretion created and confided by the law, it

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will not be revised by this court in the absence of any showing that it has been abused to the prejudice of the defendant. Such has been the uniform practice of this court, established by numerous decisions, and from which we see no reason to depart. (Noland v. The State, 3 Texas Crim. App., 598; Johnson v. The State, 4 Texas Crim. App., 268; Labaite v. The State, 6 Texas Crim. App., 257; Daugherty v. The State, 7 Texas Crim. App., 480; Cox v. The State, 8 Texas Crim. App., 254; Myers v. The State, 8 Texas Crim. App., 321; Grissom v. The State, 8 Texas Crim. App., 386; Webb v. The State, 9 Texas Crim. App., 490.)

"It has been ably argued by counsel that it is dangerous to the liberties and rights of the citizen to confide to its district judges such unrestricted power as is conferred by the broad and unqualified language of Article (576) 626 above quoted, and that it should be limited by the provisions of Article 581, following it. We do not regard Article 581 as being restrictive of the powers conferred by Article 576, and whether or not the power complained of is a dangerous one to be vested in district judges is not a question for this tribunal to determine." Again, Presiding Judge Davidson, for this court, in Lacy v. State, 30 Texas Crim. App., 127-8, said: "The granting or refusing the application rested in the sound discretion of the trial court, and on appeal the action of said court upon such application will not be revised unless it should appear that said discretion has been abused. Martin v. The State, 21 Texas Crim. App., 1; Pierson v. The State, 21 Texas Crim. App., 14; Scott v. The State, 23 Texas Crim. App., 521; Meuly v. The State, 26 Texas Crim. App., 274."

In our opinion, it is nowhere, and in no way, shown in this record that the trial judge abused his discretion in such a way as would authorize or permit this court to reverse the case, because he changed the venue. For other authorities see sec. 661, p. 424, of White's Ann. C. C. P., and sec. 200, Branch's Crim. Law of Texas.

There can be no question but that the district judge, the judge of said court, who was the judge thereof at the time the killing in this case occurred, when the indictment was found and when both previous trials of this case was had, was very much more competent to tell and to know whether a trial, alike fair and impartial to the State and the appellant, could be had in Eastland County and a proper jury procured therein, than either or all of the witnesses on that point who testified for the appellant. He acts in this, as in every other matter, under the sanction of his official oath. He is presumed to act, and we have no doubt in this case did act, fairly and impartially, and the record does not suggest in any way that his action was personal or arbitrary in an illegal sense, and it does not in any way indicate that he unjustly or otherwise usurped any power or authority in changing the venue and that he in no way acted tyranically, but that his action was that of a fair and impartial judge and in an entirely judicial way and manner. So that, in our opinion, the record in no way discloses

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that the order changing the venue of the trial of this case was otherwise than entirely legal, proper and valid.

Appellant's bill of exception No. 3, after giving the number of the cause, the court and the date, is as follows:

"Be it remembered that on the trial of the above entitled cause the State was permitted to prove by the witness Bob Agnew over the objection of the defendant that he was in the wagon yard at the time of the difficulty between the defendant and deceased and that he saw Jim Mayhew go to the corner of the Gracy & Thomas store building, near where the deceased was laying in the arms of Ike Clarke, and put or secrete a dirk knife or hollow ground razor in a hole in the wall of the building near where he was standing. To the admission of said evidence defendant objected unless it could be shown that the defendant was present, and the court overruled said objection and admitted said evidence the defendant expected to said ruling and herewith tenders his bill of exception and asks the same may be signed and made a part of the record in said cause, which is accordingly so done with this explanation, viz.: Said act was clearly a part of the res gestae occurring within a few seconds after defendant stabbed deceased and after testimony showed that at said time the defendant was standing just a few feet away from Jim Mayhew, and that said Jim Mayhew and defendant then walked away together." This bill is wholly insufficient under all the rules to require this court to pass upon the question. Conger v. State, 63 Texas Crim. Rep., 312, and cases cited therein, and cases also collated under sections 857 and 1123 of White's Ann. C. C. P.

Even if we consider this bill it presents no reversible error whatever. The only objection to the admission of the testimony was "unless it could be shown that the defendant was present." The qualification by the judge of the bill in substance and in effect, as quoted above, meets this objection on two grounds: First, he shows that it was a part of the res gestae of the transaction and, second, it in substance and in effect shows that the appellant was present. Jim Mayhew was appellant's son and was the person to whose relief appellant claims to have gone at the time he killed the deceased, and Jim Mayhew was the party with whom the deceased was having a fight at the time appellant killed the deceased. There can be no question that the whole record in this case shows that appellant was present at the time this act was done by Jim Mayhew.

There was no error in the court, on the objection of the State. refusing to permit Dr. Jones to state the mental condition of appellant when he, Dr. Jones, first saw him in the Mayhew building, as shown by appellant's 4th bill, to the effect that he, appellant, "seemed to be very much distressed." The court in allowing this bill qualified it by stating that such testimony was clearly no part of the res gestae; that the witness testified that he received a call to attend the deceased, who was dead when he reached him, and that it was twenty or twenty-

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five minutes thereafter before the witness saw the appellant, and the evidence did not disclose how much time may have elapsed between the time of the homicide when the witness received said call. The appellant, accepting this bill thus qualified, is bound thereby.

Neither does appellant's bill 5-a show any error whatever in the court's permitting the State to cross-examine Aaron Mayhew, defendant's witness, and show thereby that before the homicide Mayhew & Co., a corporation, had sued the deceased on a debt owed by him to the corporation, and that appellant owned stock in such corporation and was interested in and worked for it. The court in his qualification of said bill shows that just about an hour before the homicide, appellant told Hamby that deceased owed $400 or $500 which appellant had dug out of the ground and that the fight with Aaron Mayhew arose because of this; that deceased could not ride around on his money; that he was a damnder son-of-a-bitch than Bill Hudgens because Bill Hudgens would pay his debts and that he would cut deceased's damned guts out.

Neither does appellant's bill, as qualified by the court, show any error in permitting the testimony of what occurred at the barber shop immediately preceding and at the time of the fight between deceased and Aaron Mayhew.

By another bill it is shown that after the reputation of Avener Mayhew, one of appellant's witnesses, for truth and veracity had been attacked by the State by proving contradictory statements made by him, appellant offered to prove by several witnesses that they were acquainted with the reputation of said witness for truth and veracity and that it was good. This bill shows no error whatever as qualified by the court, because it is shown that the State did not attack the general reputation of appellant's said witness and made no attempt whatever to prove that it was bad and that the State admitted that his general reputation for truth and veracity was good.

By another bill it is shown that after the jury had brought in their verdict and it had been received and the court had rendered judgment thereon, while they were still in the jury box and before they were discharged by the court, the court said to them:

"Gentlemen of the Jury: Before discharging you, I will make one suggestion. Sometimes counsel for the defendant, in their zeal for their client, will try to discover some improper conduct on the part of the jurors, and get statements from them to use in their motion for a new trial. There is nothing wrong in this, for a good attorney should do everything in his power legitimately for his client. You have a perfect right to tell counsel anything you wish, and to give counsel any statement you may wish, but my suggestion is, that when you do it, be sure that what you say is absolutely true, for you would not want to accuse your fellow jurors of any act of impropriety and probably get him punished unless he was in fact guilty and deserved some punishment." No injury whatever is shown to appellant by

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what the court said in this matter either by said bill or otherwise. The appellant in no way claims that the jury in any way acted improperly or that any juror failed or refused to give appellant or his attorneys any information whatever about what they had done as jurors. No possible injury to appellant is shown by these remarks of the court.

The bill of appellant objecting to some testimony of a threat by the appellant against the deceased, testified to by Joe Burkett, as qualified by the court, shows no error whatever. The court in qualifying the bill says that this threat by appellant against deceased occurred just a few hours before the homicide. Aaron Mayhew testified that his father (appellant) was mad with deceased because deceased and himself had had a fight. Hamby testified that appellant told him all about his fight and called deceased a damned son-of-a-bitch and said he would cut deceased damned guts out, and other evidence clearly showed that this threat was directed towards deceased.

These are all the matters raised by this record necessary to be passed upon by us, except some complaints of the court's charge and the refusal of the court to give three special charges requested by appellant.

As to the three special charges requested, the record shows only and solely that appellant requested them, quoting them, and the court refused them. In the motion for new trial the only complaint made is that the court erred in refusing to give that charge. There is no reason or necessity anywhere given or shown by the special charge itself, or the motion for new trial, or elsewhere in the record, why such charge should be given, and we, even in examining the record, have failed to find why any or either of these charges should be given. Bird v. State, recently decided; Ryan v. State, 64 Tex. Crim. Rep., 628; 142 S. W. Rep., 878; Berg v. State, 64 Tex. Crim. Rep., 612; 142 S. W. Rep., 884. Besides, the charge of the court, together with the special charges requested by appellant, which the court did give, substantially and fully covers everything that was necessary or proper for the court to give on the subject. None of appellant's objections to the charge of the court present any reversible error whatever.

The judgment will be affirmed.

Affirmed.

DAVIDSON, PRESIDING JUDGE (dissenting).—Appellant was convicted of manslaughter, his punishment being assessed at three years confinement in the penitentiary.

This is the second appeal of this case. On February 7, 1912, this case was reversed and mandate was issued on February 19th, the same month. On the 12th of February, 1912, the district judge, Thomas L. Blanton, entered an order as follows:

"It appearing to the court that the regular term of the January Term 1912 of the District Court of Eastland County, Texas, convened the first day of January, A. D. 1912, and by law could continue for

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eight weeks, or until and including the 25th day of February, 1912, but that because all business then on the docket subject to trial had been disposed of on the 31st day of January, 1912, court then adjourned; and it further appearing to the court that since said adjournment the cases of No. 2540, The State of Texas vs. Bill Mayhew, and No. 2666, The State of Texas vs. Will Drake, have been reversed by the Court of Criminal Appeals and that the mandates in same will have been duly returned to this court by the time hereinafter mentioned, and it further appearing to the court that the said Will Drake is now in jail without bond and that he is now entitled to bail, and it further appearing to the court that a necessity will exist for transferring said two cases on change of venue to another county and that unless such orders are made during the regular eight weeks allowed by law for said January Term 1912, said two cases will have to lie over until the next regular term of court six months hence, thus depriving both the defendant and State of a speedy trial, it is therefore ordered that said District Court of Eastland County, Texas, convene in special session at the courthouse in Eastland on the 24th day of February, A. D. 1912, at 8:30 o'clock A. M., to resume business under the regular January Term 1912 of said court and during such regular term time and only for the purpose of disposing the said two causes above mentioned, at which time said two defendants, Bill Mayhew and Will Drake, are hereby notified to be present, and the clerk hereof will spread this order upon the minutes of said court and issue and have precept and copy of this order served upon Messrs. H. P. Brelsford and J. J. Butts at once and copy and publish in the Eastland Chronicle.

"Done this February 12th, 1912.

Thomas L. Blanton,
Judge 42nd Judicial District of Texas."

By the terms of this order it will be noticed that the January Term of the District Court of Eastland County convened in accordance with the statute on the first Monday in January, 1912, which fell upon the first day of the month, and that it could continue for eight weeks, but in fact did close on the 31st day of January "because all business then on the docket subject to trial had been disposed of on the 31st day of January, 1912, court then adjuorned." It further recites that it appeared to the trial judge that since the adjournment of his court two cases, No. 2540 against this appellant, and No. 2666 against Will Drake, had been reversed by the Court of Criminal Appeals, and that mandates would be returned into his court by the time hereinafter mentioned, which was the 24th of February, this order being entered on 12th day of February. It is further recited that "a necessity will exist for transferring said two cases on change of venue to another county and that unless such orders are made during the regular eight weeks allowed by law for said January Term 1912, said two cases will

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have to lie over until the next regular term of court six months hence, thus depriving both the defendant and State of a speedy trial; it is therefore ordered that said District Court of Eastland County, Texas, convene in special session at the court house in Eastland on the 24th day of February, A. D. 1912, at 8:30 o'clock a. m., to resume business under the regular January Term 1912 of said court and during such regular term time and only for the purpose of disposing of the said two causes above mentioned," etc. When this called resumption of the defunct term of court acted upon this change of venue there was an exception reserved not only to the change of venue but for many other reasons which are not necessary here to state. In the qualification to this bill the judge recites that the time for holding the aforesaid regular term is eight weeks, and that it could continue until the night of the 25th of February, 1912, but there being no further business to be transacted, the minutes were signed and approved, and court adjourned on January 31, 1912. Subsequently the mandates of the Court of Criminal Appeals reversing and remanding the two cases were returned into that court. Among other things in the qualification it is stated by the judge as follows: "*And February 24, 1912, when said court convened, it was then a part of the regular term 1912 of same. The clerk of the District Court of Eastland, Texas, will file this bill as a part of the record in this case. Done this February 24, 1912.*" So I think it is conclusively shown by the statement of the judge, by his order and qualifications of the bill and the conceded facts, although it could last eight weeks, the court did not call a special term, and that there was not called a special term of the court, but merely a resumption of the regular term. This is the declaration of the judge who called the court. Instead of continuing the eight weeks until the 26th of February, it was adjourned on the 31st of January, and the minutes were approved in the regular manner by the trial judge, and that this order calling his court together, which was issued on the 12th day of February, 1912, *was a reopening of the regular term and not a special term called under the statute.* It was expressly called by the judge as a reopening or resumption of the regular term. Therefore, all questions which might arise under the theory that it was a special term of court are not here involved. I am led to believe that the trial judge *knew his purpose in calling the court and the reasons for it, and he emphasizes the matter by stating that it was a resumption or reopening of the regular term* and not a special term. There is a difference between a regular and a special term of court. It is unnecessary to undertake to draw the distinction; they are made so by the Constitution and the statute, and the line of demarkation is definitely fixed. I hardly think it necessary to cite authorities or discuss the question that the district judge had no authority to open a regular term after it was closed—finally adjourned. It could have continued for the entire eight weeks, and the court could have taken a recess from day to day or longer and continued the regular term in

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vogue, but this was not done; it was closed finally. This eliminated all authority of the judge to reopen the regular term. Special terms are authorized to meet contingencies arising after the adjournment of the regular term; however, it is unnecessary to go into a review and reasons why special terms are authorized. The authorization of special terms would probably be unnecessary if the judge could open his regular term at any time he saw proper. So I understand it to be clear from this record that the *court did not call a special term, but only reopened or undertook to reopen the regular term,* and this he could not do, and from this viewpoint any order he might make would be ultra vires and of no effect; in fact and in law all orders entered by the judge under this call were void. It would follow, therefore, that the order entered by the judge on the 12th of February calling the court together on the 24th would necessarily be void. The transfer of the case from Eastland to Shackleford County by virtue of this order would therefore be a nullity. The District Court of Shackelford County would, therefore, have no jurisdiction of the case, for the reason the order changing venue was not authorized.

Viewed from another's standpoint, the order of the district judge is void. The order of the 12th of February was made while this case was pending in the Court of Criminal Appeals. While the judgment of the lower court had been reversed on the 7th of February, the mandate did not issue to the District Court until the 19th of February, as this court judicially knows from its own records. What time it reached the court is somewhat speculative, but it may have reached that court before the 24th of February, the time the order was made changing the venue. However that may be, the order on the 12th of February being void, all subsequent actions in the matter based thereon would be equally void, because they all depended upon that order. Art. 884, White's Ann. Code of Criminal Procedure, reads as follows: "The effect of an appeal is to suspend and arrest all further proceedings in the case in the court in which the conviction was had until the judgment of the appellate court is received by the court from which the appeal is taken; provided, that in cases where, after notice of appeal has been given, the record or any portion thereof is lost or destroyed, it may be substituted in the lower court, if said court be then in session, and when so substituted the transcript may be prepared and sent up as in other cases. In case the court from which the appeal was taken be not then in session, the Court of Appeals shall postpone the consideration of such appeal until the next term of said court from which said appeal was taken, and the said record shall be substituted at said term, as in other cases." The effect of this statute is to deprive the trial court of all authority to enter any order or take any steps in regard to the appealed case until the judgment of the Court of Criminal Appeals has been received by the court from which the appeal was taken. The authorities are uniform and unbroken in this interpretation or construction of this statute. In fact, the statute

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needs no construction. The language is all sufficiently plain to construe or interpret itself. There has been some legislation which authorizes the filing of a recognizance or appeal bond, as the case may be, in this court where such instruments are held sufficiently defective to cause a dismissal of the appeal, but that has no connection with this matter, and possibly it might be said in scire facias cases some matters might be entered nunc pro tunc, but if such be the case it is based upon the theory that scire facias is civil case after forfeiture is taken on the bond. I mention these in passing so there will be no apparent conflict. I suppose, however, the legal fraternity would understand there was none without referring to those matters. In Nichols v. State, 55 Texas Crim. Rep., 211, in an opinion by Judge Ramsey, it was said, quoting approvingly another decision: "It would seem from a proper construction of this statute that, pending appeal to this court, the trial court from which said appeal is taken can take no steps with reference to the case until this court has finally disposed of said appeal, except where some portion of that record has been lost or destroyed after notice of appeal has been given." Again, it was stated and held in the case of Lewis v. State, 34 Texas Crim. Rep., 126: "This statute, as we understand it, deprives the trial court of all jurisdiction of the case except for the purpose stated, when the appeal has gone into effect. Whether the rule provided is beneficial is not for us to decide. It is the declared will of the legislative mind, and within the scope of the authority of that body to declare. It puts an end to the time when defective records can be amended pending appeal. This statute furnishes the rule of practice in such cases, and this court will adhere to it." The same construction was announced in Quarels v. State, 37 Texas Crim. Rep., 362. See also Sheegog v. State, 39 Texas Crim. Rep., 126. In Saufley v. State, 48 Texas Crim. Rep., 563, it was held that motions amending original motion for new trial cannot be filed in the trial court after an appeal is taken. See also Reed v. State, 42 Texas Crim. Rep., 573. In many cases it has been held the court has no authority after appeal to enter recognizances nunc pro tunc. See Morse v. State, 39 Texas Crim. Rep., 566; Freshman v. State, 39 S. W. Rep., 1118; Quarels v. State, 40 Texas Crim. Rep., 353; Clay v. State, 56 Texas Crim. Rep., 515; Youngman v. State, 38 Texas Crim. Rep., 459; Estes v. State, 38 Texas Crim. Rep., 506; Dement v. State, 39 Texas Crim. Rep., 271; Donnelly v. State, 51 S. W. Rep., 228; Maxey v. State, 41 Texas Crim. Rep., 556. These cases passed on many questions arising after notice of appeal, each and all of them holding that after the jurisdiction of this court has attached no order can be made in the trial court of any character except as authorized by statute. Hinman v. State, 54 Texas Crim. Rep., 434. See also White's Ann. Crim. Proc., sec. 1236. It would seem unnecessary to cite authorities in support of the announced proposition that the court below lost all jurisdiction while the case was pending in this court, and that it could not assume any jurisdiction in the case for any purpose until after

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mandate of this court had been filed in the lower court. The statute and the cases make this rule absolute.

The action of the court to call a special session or reopen court was based upon the proposition that a speedy trial alike for the State and the defendant could not be had unless the court ordered a change of venue; that it would be six months before the District Court should again convene in regular session. The law does not authorize a speedy public trial for the State. The State is not on trial. The Constitution guarantees a speedy public trial to the accused. He did not seem to be anxious to have the trial in the manner indicated by the district judge. He was fighting the change of venue with considerable vehemence. As we understand the statute with reference to change of venue, it does not authorize the transfer of cases from one county to another on the ground of speedy public trial; at least not in this character of case. There is a statute of venue with reference to rape, but this is not a case of rape. This is a case of homicide, and the fact that the statute confines itself to questions of venue in rape cases under a given state of facts emphasizes the fact that homicide cases were not included. The inclusion of the crime of rape in that particular statute, and rape only, emphasizes the fact that other offenses were excluded.

A great deal of testimony was also introduced as to the condition of Eastland County with reference to this case, whether the State and defendant alike could have a fair trial. That seems to have gotten into the trial of the case on the 24th of February, at the time of the transfer on change of venue was made. It had not theretofore entered into or become a part of the case. The judge had not specified this as a reason for reopening his court. We have read the testimony in regard to the state of public opinion in regard to the case as evidenced by the witnesses, and fail to find any evidence in the case that showed otherwise than that an impartial trial could be had in the county. All of the witnesses who testified in regard to the matter, many of whom were officers, a majority of the witnesses were county officials, make it apparent that there was no basis for a change of venue for this reason. It was not even contended by the State that such a condition of affairs existed, but by the State that fact was denied. One of the private counsel for the prosecution testified in the case to this effect. The truth of the matter seems to be from the order of the court and all the record, that the transfer was made only for the purpose of having a more speedy trial of the case by transferring it to another county where court could be held before the Eastland District Court would be convened. If it was necessary to decide this question, we are of opinion the court erred in transferring it from this viewpoint. Moore v. State, 46 Texas Crim. Rep., 54. Change of venue by the judge is not arbitrarily confided to him or his discretion. His discretion is to be exercised in the interest of fair trial and impartial justice.

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There are some questions presented, in my judgment, which would require a reversal, but I pass those without further discussion.

The judgment ought to be reversed and the case remanded.

LAWRENCE HENDRICKS V. STATE.

No. 2136. Decided January 22, 1913.

Rehearing denied March 19, 1913.

1.—Murder in First Degree—Charge of Court.

Where defendant was convicted of murder in the second degree, the court's charge on murder in the first degree need not be considered on appeal; however, the charge was correct.

2.—Same—Charge of Court—Murder in the Second Degree.

Where the court submitted the issues of manslaughter and self-defense and submitted a charge on murder in the second degree, which has often been approved by this court, there was no error and it is wholly unnecessary to define in the latter the words, "tend to mitigate, excuse or justify the act."

3.—Same—Murder in the Second Degree—Charge of Court.

Where the court's charge on murder in the second degree was in full compliance with approved precedent and also charged fully on manslaughter and defined adequate cause, it was not necessary to do so again in the charge on murder in the second degree. Following Best v. State, 58 Texas Crim. Rep., 327.

4.—Same—Charge of Court—Manslaughter—Adequate Cause.

Where the court's charge on manslaughter was more favorable to defendant than called for by the evidence, when construed as a whole, and his definition of adequate cause was correct, there was no error.

5.—Same—Charge of Court—Burden of Proof—Reasonable Doubt.

Where the court's charge on manslaughter in connection with his charge on murder properly applied the doctrine of reasonable doubt, the contention that the court's charge placed the burden on defendant is untenable. Distinguishing Huddleston v. State, 54 Texas Crim. Rep., 93.

6.—Same—Sufficiency of the Evidence.

Where, upon trial of murder, the evidence sustained the conviction of murder in the second degree, there was no reversible error, although the jury might have reached a different verdict.

Appeal from the Criminal District Court of Dallas. Tried below before the Hon. Barry Miller.

Appeal from a conviction of murder in the second degree; penalty, fifteen years imprisonment in the penitentiary.

The State's testimony substantially showed that in the afternoon the deceased came to his store, which belonged to a company in which deceased and defendant were both interested, and defendant asked deceased something about a ring that the latter had in pledge there; that the deceased had paid interest on the ring and defendant contended that it was a personal loan, while deceased contended that it was out of the company's money, and both looked over the books with reference

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thereto and became involved in a wordy altercation, whereupon defendant drew his six-shooter and shot deceased, firing two shots at him, one of which proved fatal.

The defendant claimed self-defense and manslaughter.

W. L. Crawford, Jr., and *J. C. Muse* and *Albert Walker* and *C. F. Greenwood* and *R. B. Allen,* for appellant.—On question of court's charge of manslaughter: Snowberger v. State, 58 Tex. Crim. Rep., 530; 126 S. W. Rep., 878; Brown v. State, 54 Tex. Crim. Rep., 121; 112 S. W. Rep., 80; Rocquemore v. State, 59 Tex. Crim. Rep., 568; 129 S. W. Rep., 1120; Huddleston v. State, 54 Tex. Crim. Rep., 93; 112 S. W. Rep., 64.

On question of reasonable doubt: Coffin v. U. S., 156 U. S., 432.

On question of court's charge on self-defense: Swain v. State, 86 S. W. Rep., 335; Pannell v. State, 54 Tex. Crim. Rep., 498; 113 S. W. Rep., 536; Pratt v. State, 59 Tex. Crim. Rep., 635; 129 S. W. Rep., 364; Huddleston v. State, 54 Tex. Crim. Rep., 93; 112 S. W. Rep., 64; Williams v. State, 59 Tex. Crim. Rep., 624; 129 S. W. Rep., 838; Brown v. State, 54 Tex. Crim. Rep., 121; 112 S. W. Rep., 80.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was indicted, charged with murder, and when tried was convicted of murder in the second degree, and his punishment assessed at fifteen years confinement in the State penitentiary.

There were no bills of exception reserved to the admissibility or rejection of any testimony offered, but in the motion for new trial there are many complaints to the charge of the court as given and refusal of the court to give some special charges requested.

As to the complaints of that portion of the charge relating to murder in the first degree, we do not deem it necessary to discuss them, as appellant was convicted of murder in the second degree only, and the error, if error there be, could not have injuriously affected appellant. However, we have carefully read that portion of the charge, and it is couched in language frequently approved by this court. See authorities cited in secs. 418, 419, 420 and 421 of Branch's Crim. Law.

In defining murder in the second degree the court instructed the jury:

"The next lower grade of culpable homicide to murder in the first degree is murder in the second degree.

"Malice is also a necessary ingredient of the offense of murder in the second degree. The distinguishing feature, however, so far as the element of malice is concerned, is that, in murder in the first degree, malice must be proved, to the satisfaction of the jury, beyond a reasonable doubt, as an existing fact, while in murder in the second degree malice will be implied from the fact of an unlawful killing.

"Implied malice is that which the law infers from or imputes to

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certain acts, however suddenly done. Thus, when the fact of an unlawful killing is established, and the facts do not establish express malice beyond a reasonable doubt, nor tend to mitigate, excuse or justify the act, then the law implies malice, and the murder is in the second degree; and the law does not further define murder in the second degree than if the killing is shown to be unlawful, and there is nothing in evidence on the one hand showing express malice, and on the other hand there is nothing in evidence that will reduce the killing below the grade of murder, then the law implies malice, and the homicide is murder in the second degree."

This definition of murder in the second degree, where the court submits also the issues of manslaughter and self-defense, has been so often approved we hardly deem it necessary to discuss the criticisms thereof. Barton v. State, 53 Texas Crim. Rep., 443; McGrath v. State, 35 Texas Crim. Rep., 413; Smith v. State, 45 Texas Crim. Rep., 552; Carson v. State, 57 Texas Crim. Rep., 394; Harris v. State, 8 Texas Crim. App., 90; Smith v. State, 48 Texas Crim. Rep., 33; Hernandez v. State, 53 Texas Crim. Rep., 468. However, we will say that when the court fully charged on manslaughter and self-defense, it was wholly unnecessary for him to define in these paragraphs the meaning of the words "tend to mitigate, excuse or justify the acts," and the paragraphs are not upon the weight to be given the testimony. The court in submitting the issue of murder in the second degree, after defining it as above stated, instructed the jury:

"If you believe from the evidence, beyond a reasonable doubt, that the defendant in the County of Dallas and State of Texas, on or about the 26th day of January, 1909, as alleged, with a deadly weapon, or instrument reasonably calculated and likely to produce death by the mode and manner of its use, in sudden passion aroused without adequate cause, and not in defense of himself against an unlawful attack, real or apparent, reasonably producing a rational fear or expectation of death or serious bodily injury, and not under circumstances which would reduce the offense to the grade of manslaughter, with intent to kill, did unlawfully and with implied malice, shoot with a pistol and thereby kill M. B. Clark, as charged in the indictment, you will find him guilty of murder in the second degree, and assess his punishment at confinement in the State penitentiary for any period that the jury may determine and state in their verdict, provided it be for not less than five years."

This submission of the issue was in full compliance with the form recommended by this court in Best v. State, 58 Texas Crim. Rep., 327. It was not necessary to define "adequate cause" in this paragraph. Subsequently in the charge these words were fully defined, and in considering the charge of the court, all of it must be construed together, and if it as a whole fairly defines the words and submits the issues raised by the testimony, it is sufficient. The other criticisms of the charge on murder in the second degree are hypercritical.

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The charge on manslaughter in this case, if anything, was more favorable to appellant than called for by the evidence, and the criticisms thereof, when the charge is construed as a whole, are unauthorized. After defining "adequate cause," telling the jury that if by adequate cause sudden passion was aroused, the defendant would be guilty of no higher degree of offense than manslaughter, the court instructed the jury:

"If you believe from the evidence, beyond a reasonable doubt, that the defendant, with a deadly weapon, in a sudden passion arising from an adequate cause, as the same has been hereinbefore explained, and not in defense of himself against an unlawful attack producing a reasonable expectation or fear of death or serious bodily injury, did, in the County of Dallas and State of Texas, on or about the 26 day of January, 1909, as alleged, did with a pistol shoot and thereby kill M. B. Clark, the deceased, as charged in the indictment, you will find the defendant guilty of manslaughter, and assess his punishment at confinement in the State penitentiary for any term of not less than two nor more than five years."

The court further instructed the jury in his charge: "If from the evidence you are satisfied, beyond a reasonable doubt, that the defendant is guilty of murder, but have a reasonable doubt whether it was committed upon express or implied malice, then you must give the defendant the benefit of such doubt, and not find him guilty of a higher grade than murder in the second degree. Or, if from the evidence you believe, beyond a reasonable doubt, that the defendant is guilty of some grade of culpable homicide, but you have a reasonable doubt whether the offense is murder of the second degree or manslaughter, then you must give the defendant the benefit of the doubt, and in such case if you find him guilty it could not be of a higher grade of offense than manslaughter."

The contention is that in the paragraph first above copied, the court placed upon the defendant "the burden to prove beyond a reasonable doubt that adequate cause and sudden passion existed" before they would be authorized to reduce the offense to manslaughter. It is true, as contended by appellant, that manslaughter is in the nature of a defense against murder in the first or second degree, and where the State introduced testimony which would authorize a conviction of murder, the defendant would be authorized to introduce evidence to reduce the offense, which would show the offense of no higher grade than manslaughter, and if he did do so, it would be the duty of the State to prove beyond a reasonable doubt that he was guilty of the higher grade of offense before the jury would be authorized to so find, and it would also be the duty of the court to inform the jury in his charge that if there was a reasonable doubt in the premises, to give the defendant the benefit of such doubt. But in the paragraph above quoted, when taken together, we think, the court gave defendant the benefit of such doubt. Before the jury would be authorized to convict

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the defendant of any offense, they must find the facts which would authorize it in so doing beyond a reasonable doubt under our law, and the court so instructed the jury as to all three degrees of unlawful homicide. Then the court instructed the jury that if they had a reasonable doubt as to what degree of unlawful homicide defendant was guilty, to give the defendant the benefit of such doubt, and not find the defendant guilty of any degree of unlawful homicide than that of which they had no doubt. We are cited by appellant to the case of Huddleston v. State, 54 Texas Crim. Rep., 93, as sustaining their contention. We do not think that case, when construed in connection with the facts and the charge as there given, sustains their contention in his case. In the Huddleston case the court required the jury to find certain facts affirmatively before they would be authorized to reduce the offense to manslaughter. In this case the jury is instructed if they have a doubt as to whether the defendant is guilty of murder in the second degree or manslaughter, to give the defendant the benefit of the doubt and find the defendant guilty of no higher degree of offense than manslaughter, as shown in the paragraphs of the court's charge above copied.

We have carefully examined the court's charge, and the special charges given at the request of appellant, and we think they present admirably every issue raised in the case. The court's charge, exclusive of the special charges requested, presented every issue raised by the testimony, but there can be no doubt that the charge as given, together with the special charges requested by appellant which were given, presented every issue raised by the testimony, and under such circumstances, when there was no error in the charge of the court, there is no such question presented as should require a reversal of the case. The evidence offered in behalf of the State, if believed by the jury, would authorize a most severe penalty. The evidence offered in behalf of the defendant might authorize the jury to find that he was acting in self-defense, but the jury finds against such contention, and under the circumstances we do not think we are authorized to disturb their finding. Certainly the court fully instructed them as to the facts under which they would be authorized to find appellant guilty of murder in the second degree and manslaughter, and they find him guilty of murder in the second degree. Also the court fully instructed them in regard to justifiable homicide, and this charge in connection with the special charges given present that issue. We have carefully reviewed every assignment in the case, and while not discussing each and every ground assigned in the motion for new trial, we have considered each of them, and we are of the opinion that in none of them are presented any error which should result in a reversal of the case under the evidence adduced.

The judgment is affirmed.

Affirmed.

[Rehearing denied March 19, 1913.—Reporter.]

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B. C. POWERS v. STATE.

No. 1979. Decided November 20, 1912.

Rehearing denied January 22, 1913.

1.—Theft of Cattle—Charges of Court—Circumstantial Evidence.

Where, upon trial of theft of cattle, the court's charge on circumstantial evidence followed approved precedent, there was no error. Following Barr v. State, 10 Texas Crim. App., 507, and other cases.

2.—Same—Charge of Court—Fraudulent Intent.

Where, upon trial of theft of cattle, the evidence showed that the defendant was connected with the original taking, there was no error in refusing a requested charge that if defendant only assisted in procuring the property for another, to acquit him.

3.—Same—Evidence—Unrecorded Brand—Charge of Court—Identity—Ownership.

Where the unrecorded brand was not relied on to prove ownership, and the identity of the animal alleged to have been stolen was proved by other testimony, there was no error in the court's failure to instruct the jury as to the purpose for which such brand is admitted in evidence.

4.—Same—Charge of Court—Practice on Appeal.

Where the objections to the court's charge are not presented by bill of exceptions or motion for new trial, they need not be considered on appeal.

5.—Same—Sufficiency of the Evidence.

Where it was shown that the defendant took the alleged animal from its accustomed range, tied it in the woods, and afterwards went out and butchered it, the conviction for theft was sustained.

Appeal from the District Court of Zavala. Tried below before the Hon. R. H. Burney.

Appeal from a conviction of theft of cattle; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Geo. C. Herman and *Jno. W. Hill* and *R. C. Walker* and *Will A. Morriss*, for appellant.—On question of unrecorded brand: Sapp v. State, 77 S. W. Rep., 456; Williams v. State, 66 Tex. Crim. Rep., 348; 147 S. W. Rep., 571; Tittle v. State, 30 Texas Crim. App., 597; Childers v. State, 37 Texas Crim. Rep., 392; Welch v. State, 42 id, 338; Spiller v. State, 61 Tex. Crim. Rep., 555; 135 S. W. Rep., 549.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was convicted of theft of one head of cattle, and his punishment assessed at two years confinement in the penitentiary.

The court in this case charged on circumstantial evidence, and appellant complains of the charge in this respect. However, this paragraph is drawn in terms frequently approved by this court. Barr v. State, 10 Texas Crim. App., 507; Reeseman v. State, 59 Tex. Crim.

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Rep., 430; 128 S. W. Rep., 1126, and cases cited in Branch's Crim. Law, sec. 204, where the rule is laid down that no precise words need be employed if the charge contains the test of exclusion—circumstantial evidence being only sufficient when it excludes every other reasonable hypothesis except that of the guilt of the defendant. The charge in this case meets this test.

Appellant also complains of the failure of the court to give his special charge wherein he requested the court to charge the jury that unless they found beyond a reasonable doubt he sold the cow to W. E. Moore, to acquit, and further if they believed the defendant only assisted in getting the cow for another, to acquit him. The evidence in this case shows that appellant went to Moore and others and told them about the cow, and when they went to butcher the cow appellant alone knew where she was tied, and he had to show her to the others. The theft was complete when the cow was taken possession of and tied to a tree to be butchered, and the circumstances clearly indicate that appellant was the person who did these acts, and even if he was taking the cow for another, where there is no suggestion in the evidence that he believed the cow belonged to such person, he would be guilty of theft and the court did not err in refusing the special instruction.

Inasmuch as the evidence does not disclose that the owner of the cow had his brand on record, appellant requested the court to instruct the jury that they could consider the evidence of the brand on the animal for no purpose except to establish identity, and the brand together with the other facts must establish the identity of the animal beyond a reasonable doubt, or there would not in law be established any ownership. The charge as requested should not have been given, because it was not the law of the case. However, the charge would have been sufficient to call the court's attention to the fact that evidence of an unrecorded brand cannot be introduced to establish ownership, and if the brand had been relied on in this case to prove ownership, a charge so instructing the jury should have been given. But the brand was not relied on to prove ownership. John S. Thompson clearly identified the cow, and testified to the ownership of the cow, and that he had sold her to M. L. Thompson just about four days before the alleged theft. He described the cow minutely, and said "she was my individual property, and I sold her to M. L. Thompson on September 11, 1911." Under such circumstances, when evidence of an unrecorded brand is introduced without objection, it was not necessary for the court to instruct the jury as to the purpose for which the brand was admitted, for the reason, as before stated, ownership was not sought to be established by the brand.

The third special charge was fully covered by the court's main charge. We have discussed these propositions, although it was wholly unnecessary to do so, as they are not presented in the motion for a new trial in a way to bring them before us for review. Byrd v. State, decided at the present term of court.

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The evidence fully supports the verdict, for the theft was complete when the animal was taken from its accustomed range, and tied in the woods where appellant and others went and subsequently butchered it. It is immaterial in this case who sold the beef. The evidence might raise the question that others were principals in the offense, or that Moore was an accessory, but it would not in any way suggest that any person other than appellant was connected with the original taking.

The judgment is affirmed.

Affirmed.

[Rehearing denied January 22, 1913.—Reporter.]

JIM JONES v. STATE.

No. 2165. Decided January 22, 1913.

1.—Murder—Charge of Court—Aggravated Assault—Deadly Weapon.

Where, upon trial of murder and a conviction of manslaughter, the evidence showed that the knife which defendant used was a pocket-knife, carried in his watch pocket and could not have been very large, and there was no description of said knife, and the wound inflicted was in a dangerous locality of the body where it would probably strike an artery, and defendant testified that he did not intend to kill, but used said knife in self-defense, the court should have charged aggravated assault, and the provisions of Art. 1147, Revised Penal Code. Following Connelly v. State, 45 Texas Crim. Rep., 142 and other cases.

2.—Same—Evidence—Threats—Character of Deceased.

Where, upon trial of murder, the evidence showed deceased was of a dangerous and desperate character, and had told defendant that she had killed one negro and that she purposed killing him, the court should have permitted defendant to show that deceased did kill another negro who was her own husband, although defendant had not shown that he was aware of this fact at the time the threat was made. Following Childers v. State, 30 Texas Crim. App., 160.

3.—Same—Charge of Court—Self-defense.

Where, upon trial of murder, the evidence raised the issue of self-defense, the court should have given a clear and affirmative charge thereon.

Appeal from the District Court of Navarro. Tried below before the Hon. H. B. Daviss.

Appeal from a conviction of manslaughter; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Gibson & Callaway, for appellant.—On question of court's failure to charge on aggravated assault and deadly weapons: Honeywell v. State, 49 S. W. Rep., 586; Fitch v. State, 36 S. W. Rep., 584; Griffin v. State, 50 S. W. Rep., 366; Johnson v. State, 60 S. W. Rep., 48, and cases cited in opinion.

C. E. Lane, Assistant Attorney-General, for the State.

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DAVIDSON, PRESIDING JUDGE.—Appellant was convicted of manslaughter. The jury acquitted appellant of murder in both degrees. Therefore, it is not necessary to state with any degree of particularity the State's evidence. In a general way the evidence shows that deceased and appellant had been living in adulterous relations,—at least, such is the inference from the facts. On the evening of the homicide they had been in the town of Kerens, appellant having driven there in a buggy. The deceased, Mary Lee Martin, became outraged with appellant for some reason, got in appellant's buggy and demanded that he go home with her, which he at first declined. When she told him to get in the buggy and appellant told her he did not want to, she said, "You God damn scar-eyed son-of-a-bitch, if you don't go home with me you will kill me or I will kill you." Appellant did not just at that moment get in the buggy and deceased started to drive away in the buggy; that he then got in the buggy to keep her from carrying off his horse and buggy. Deceased was driving when she left the town of Kerens. After going some distance from town they got into trouble. The evidence is very confusing and much in conflict as to how this arose and what occurred at the time. The State's theory was that after they got out of the buggy appellant wanted her to get in and go with him to get some clothing of his which he had left at her house. She had changed her mind and said she would not go and was going to return to Kerens. The State's evidence at this particular point is that appellant told her she must go with him or he would kill her, or words to that effect, and the difficulty began. Some of the witnesses testified that while they were in the fight appellant struck the deceased on the head with a buggy whip, which broke; he then got his knife and cut her with it, inflicting one blow from which she subsequently died. After striking her with the knife he helped her into the buggy and drove away, carrying her to her own home, where she was subsequently found dead. It is not intended to follow out the State's case on the facts with any detailed statement, because of the acquittal of murder. Appellant's testimony substantially was that he had known the deceased three or four years; that he went to Kerens on the Saturday afternoon of and preceding the killing in a buggy with his brother, reaching that point about one o'clock, and hitched his horse to a cultivator south of Mr. Foether's store; about half-past one or two o'clock he saw deceased for the first time and saw her several times during the afternoon. He testified that during the first conversation after he reached Kerens, deceased asked him if he was going home with her; that he informed her he was not, and no further reference was made to the matter until late in the afternoon, when she again asked him if he was going home with her; that he again told her he was not, and she then informed him she was going to take his horse and buggy, and he told her to leave it alone, that he did not want to go to her house. Just before leaving town he was standing in company with Fred and Gensie Colbert and Noland Tolliver; at this time deceased drove up

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in his buggy and was right at him before he saw her; she told him to get in the buggy; he says, "I told her I didn't want to and she said, 'You God damn scar-eyed son-of-a-bitch, if you don't go home with me you will kill me or I will kill you.'" That he did not then get in the buggy and she started away; that he then got in the buggy to keep her from carrying away his horse and buggy. When they started out of the town, deceased was quarreling with him and cursing him for a son-of-a-bitch and one thing and another along the road; that she said to him, "I killed one negro and I will kill you." When they reached a point just below Mr. Floyd's she decided she would go back to town and he told her he had some clothes down at her house and wanted to go get them, and she said she was not going a God damn step; that she then hit him on the side of the head with her fist. "That hurt me. She then started into her stocking after her knife and I pushed her out of the buggy." That after he had pushed her out of the buggy he tried to get her to get back and go with him and get his clothes, but this she would not do. He says, "I pulled at her and she cut at me, and I cut at her and she cut my shirt. When I hit her with the buggy whip she was cutting at me with her knife. I did not have my knife out at that time; it was in my pocket. I have seen the knife which is now shown me before." (Counsel for defendant here showed the defendant the knife which defendant testified he picked up at the scene of the killing, thinking it was his knife.) Then appellant states, "That is her knife. That is the knife she had. I said I struck her with the whip because she was cutting at me with her knife. At that time I had not gotten my knife. I got it in a little while after that." That he was in his shirt sleeves and had his knife in his right-hand watch pocket of his pants. He gave a description of the cut on his shirt, showing that it was about the waistband of his pants and several inches long. That he had not worn that shirt any more until he wore it the day of the trial and showed it to the jury. He further testified: "I cut that woman with my knife because she was trying to kill me or cut me or something. When I cut at her I did not know where I hit her; I just knew I hit her up there somewhere. I was not aiming at any particular spot when I cut; I was just cutting anywhere I could. When I reached home that night there was nobody there but my mother and my wife. After I cut her she staggered back a little and I just caught hold of her arm and carried her to the buggy. When she fell I did not try to cut her throat or choke her. When I cut or stabbed her I did not intend to kill her. Just before I drove off I picked up a knife. It was her knife that I picked up. I intended to pick up my knife. I dropped my knife and she dropped her's and I picked up her knife." Without going into further detail of the testimony we think this is sufficient to discuss the main question involved.

1. The court failed and refused to charge on the law of aggravated assault, stating in his qualification to the bill of exceptions that he did not believe the facts suggested this issue. There is no description

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of the knife, given by any of the witnesses, that is as specific or certain as that given by the defendant, above quoted. It is evident that the knife was a pocket-knife and could not have been a very large one if it was carried, as appellant says, in the watch pocket of his pants. The State's witnesses do not undertake to describe the knife. The wound proved to be a deadly one and is described as having been inflicted about three inches below the collarbone and a little to the left of the medium line of the breast. It was in a dangerous locality, as testified by the physician, and inflicted at a point where the probabilities were that it would strike an artery. There is practically no evidence in regard to the amount of loss of blood. Appellant requested an instruction submitting the issue of aggravated assault and giving in charge the provisions of Article 1147 of the Revised Penal Code. This Article reads as follows: "The instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless, from the manner in which it was used, such intention evidently appears." The weapon, not being one of a deadly character, it is not to be presumed that it was such a weapon, and if not being deadly in its nature the intent would not be presumed from that fact. Appellant himself testifies that he did not intend to kill her, but was cutting at her because she was cutting at him. It would be a useless consummation of time or words to review this question. It has been so often decided that we will content ourselves by simply citing the cases which made a charge of this sort necessary. Connell v. State, 45 Texas Crim. Rep., 142; Danforth v. State, 44 Texas Crim. Rep., 105; McDowell v. State, 55 Texas Crim. Rep., 596; Snowberger v. State, 58 Texas Crim. Rep., 530; Washington v. State, 53 Texas Crim. Rep., 480; Craiger v. State, 48 Texas Crim. Rep., 500; Crow v. State, 55 Texas Crim. Rep., 200; Shaw v. State, 34 Texas Crim. Rep., 435. The question involved has been so thoroughly discussed and reviewed in these cases, we dismiss that part of the case by saying that it was error on the part of the court to refuse to give these instructions and submit that issue to the jury.

2. There is another question in the case that appellant insists should reverse the judgment. Without conflict the evidence shows the deceased to have been a woman of dangerous, if not desperate character. She told appellant during their altercation that she had killed one negro and she purposed killing him. In this connection appellant offered to prove by the witness Fox that the deceased did kill another negro who was at the time of his being killed the husband of the deceased. This was offered for various purposes and thought by appellant to be germane and permissible under the peculiar facts of the case, as affecting her reputation as dangerous, as well as in connection with her statement to him that she had killed a negro. The court excluded this upon the theory that it was not proposed by defendant to

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show that he was aware of the fact that she had killed her husband. The general rule is that testimony of isolated facts unknown to the accused that bear upon the reputation and character of deceased for violence would not be admissible. If he was aware of it, or had been informed of it, it would be admissible as tending to affect the mind and for such other legitimate purposes in the case. While we do not believe, under the peculiar facts of the case, it would be reversible error, yet, under what has been stated, we are of opinion that it should have gone to the jury for what it was worth in relation to the question of her threats and reputation in regard to being a dangerous woman. She had informed him of the fact that she had killed a negro, but had not specified what negro she had killed. While the fact that the deceased negro was her husband was not material, in view of the fact of his want of knowledge of said fact, but that she had killed another negro was known to him, the mere fact that it was her husband would not exclude the particular fact and it might have assisted the jury to determine the fact whether or not she was a woman of dangerous character and one who would execute her threats. If the statement had not been made to defendant by deceased that she killed one negro, then there would have been no error on the part of the court rejecting the testimony. If she stated to the defendant at the time of the difficulty that the negro she had killed was her husband, then it would have been admissible to show that she had killed her husband. The mere fact that she did not designate the particular negro she had killed, when she threatened the defendant, we believe would not, therefore, exclude the evidence that her husband was the negro she killed. Under all the circumstances this may not have amounted to a great deal, but still under the peculiar facts of the case we are of opinion that this evidence should have gone to the jury. This seems to be in line with the decision in the Childers case, 30 Texas Crim. App., 160, and quite a line of cases which follow and is in line with the Childress opinion. The deceased, in the Childress case, informed appellant of the fact that he killed a man, etc., not specifying who the man was, and stated that he had been in the penitentiary for killing a man. The court held that character of testimony was clearly admissible, and the court in this case seems to have followed the Childress case in admitting testimony that she had killed one negro at the time she threatened to kill him. If this matter comes up on another trial we see no reason why the name of the negro could not be produced in evidence.

3. There is some criticism of the charge on self-defense. Upon another trial we suggest to the trial court to give a clear charge on this subject unmixed with other matters in the case. The defendant is always entitled to a clear and affirmative presentation of his defensive matters whatever they may be.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

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ALFRED LOAN v. STATE.

No. 2140. Decided January 29, 1913.

1.—Carrying Pistol—Evidence—Confession—Charge of Court.

Where the statement or confession contained both inculpatory and exculpatory matter, but the State did not rely solely upon the same and introduced other inculpatory evidence, there was no error in the court's failure to charge the jury that the State was bound by such statement or confession unless it was shown to be false. Following Slade v. State, 29 Texas Crim. App., 381.

2.—Same—Practice—Fining Witness.

Where the record on appeal showed that the witness who was fined while testifying willfully evaded answering questions by which the court did not seek to control the answers thereto, and which did not indicate the opinion of the court as to the guilt of the defendant and no injury was shown to the defendant, there was no reversible error.

Appeal from the County Court of Parker. Tried below before the Hon. F. O. McKinsey.

Appeal from a conviction of unlawfully carrying a pistol; penalty, thirty days confinement in the county jail.

The opinion states the case.

Preston Martin and *Hood & Shadle*, for appellant.—On question of court's action in interrogating and fining witness: Copeney v. State, 10 Texas Crim. App., 473; Moncallo v. State, 12 id, 171; Harris v. State, 37 Texas Crim. Rep., 441; Harrell v. State, 39 id, 204; Mitchell v. State, 65 Tex. Crim. Rep., 545; 144 S. W. Rep., 1006; Wragg v. State, 65 Tex. Crim. Rep., 131; 145 S. W. Rep., 342.

On question of charging on exculpatory evidence: Pharr v. State, 7 Texas Crim. App., 472; Jones v. State, 29 id, 20; Pratt v. State, 50 Tex. Crim. Rep., 227; 96 S. W. Rep., 8; Combs v. State, 52 Tex. Crim. Rep., 613; 108 S. W. Rep., 649.

On question of requested charges: Orner v. State, 65 Tex. Crim. Rep., 137; 143 S. W. Rep., 935.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was prosecuted and convicted of unlawfully carrying a pistol.

The evidence satisfactorily establishes the fact that appellant had a pistol on the occasion complained of, and fired it off, if not in the presence of, at least quite near to several ladies, two of whom positively identify appellant as one of the two persons who drove by them but a short time before the pistol was fired, going in the direction in which the pistol was fired. The two in the buggy are positively identified as appellant and one Willie Gray. The State introduced Andrew Moore, who testified: "My name is Andrew Moore; I live at Garner, in this county. I know the defendant, Alfred Loan. He lives

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out on a farm near Garner. I was a witness in this case at the last term of court. I think the defendant had me summoned. About two weeks after the other trial I met the defendant and was congratulating him on his trial. I had heard that he had a hung jury. He said, yes, he was surprised that they did not stick him from the way some of the witnesses swore. He said some of the witnesses swore both ways against him; they swore that he had a pistol, and then they swore he did not have a pistol. He said in that conversation that he was guilty; that he had the pistol all right. Then he told me that he was joking; that he did not have any pistol at all. That was a short time after the other trial."

Appellant insists that, based on this testimony, the court should have instructed the jury that as the State introduced his testimony as a confession of guilt, the State is bound by the whole conversation had at the time unless it was shown to be false. This statement or confession may be said to contain both inculpatory and exculpatory matter, as the witness says that appellant first admitted to him he had the pistol, but subsequently stated he was joking, and if the State relied solely upon this statement for a conviction, appellant's contention would be correct. But the State, in addition to this statement or confession, introduced other inculpatory evidence, and upon which a jury would have been authorized to return a verdict of guilty, and under such circumstances a failure to so charge the jury does not present reversible error. In Slade v. State, 29 Texas Crim. App., 392, this court, speaking through Judge Hurt, said: "In the Pharr case the trial court had submitted to the jury two charges relating to the confessions or statements of the accused, the last being calculated to neutralize the first; the first being correct and the last wrong. The charge rejected in this case is in the language of the correct one in Pharr's case. Now it is not decided in the Pharr case that, though correct, such a charge must always be given, when requested, in every case in which the State introduces in evidence the admissions of the accused. This question was not before the court in the Pharr case. Under what circumstances must such a charge be given? This question is answered in Jones v. The State, ante, p. 20. When the State relies for conviction alone upon the admissions and confessions of the accused, and such confessions or admissions contain exculpatory or mitigating matters, such a charge should be given. In this case the State did not rely upon confessions or admissions alone for conviction."

The only other matter presented in the motion for new trial we deem it necessary to discuss relates to the action of the trial judge in fining a witness while on the witness stand. The State placed Willie Gray on the stand to testify. He stated he and appellant drove by in the buggy together, as testified to by the other witnesses, and at the point designated by them he heard "a noise," but did not know the kind nor character of noise, nor what made it. The record discloses

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that this witness in substance answered all material questions, "I do not know " The court then asked him some questions which he could have answered in a way that would have been beneficial to either the State or the defendant, the court not framing the questions so as to suggest the guilt of defendant, but asking them in a way as to leave the witness free to answer as the facts justified. The witness continuing in a "don't know" frame of mind, the court assessed a fine against the witness and instructed the sheriff to take him to jail until he could answer the questions. Appellant contends that this action on the part of the court was very detrimental to him, and an indication to the jury that the court thought appellant guilty. Our satute is very strict in its rules that the judge shall in no way indicate to the jury his opinion as to the guilt or innocence of an accused person, or the weight to be given the evidence or any portion thereof, but none of our decisions go to the extent that where a witness is placed upon the stand and he refuses to answer questions, or answers them in an evasive way, that the court cannot fine such witness and commit him to jail until he will answer the questions. The record in this case discloses that the witness was wilfully evading answering questions as to facts he is placed in such juxtaposition to he must have known, and under such circumstances we think the court is authorized to punish as for contempt if the witness does not answer the questions. We are not saying how he shall answer the questions, and neither was the trial court in this instance. If the facts justified he could answer them in a way that would result in an acquittal; this the court did not seek to control. Courts are organized to develop the real truth in each case, and the trial courts must exercise sufficient authority to compel witnesses to testify, and while not to indicate the opinion of the court as to the guilt or innocence of an accused person, yet the mere assessment of punishment, and instructing the sheriff to keep the witness in jail until he will answer questions propounded to him, cannot be held to be injurious to a defendant.

Exclude the testimony of Willie Gray, and the evidence amply supports the verdict, and as the jury assessed the lowest penalty authorized by law, in no event could the conduct of the court complained of have been injurious to defendant.

The judgment is affirmed.

Affirmed.

FRANK MISHER V. STATE.

No. 2016. Decided December 4, 1912.

Rehearing denied January 29, 1913.

1.—Occupation—Intoxicating Liquors—Local Option—Indictment—Precedent.

Where, upon trial of unlawfully pursuing the occupation of selling intoxicating liquors in local option territory, the indictment followed approved precedent, there was no error. Following Slack v. State, 61 Texas Crim. Rep., 372.

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2.—Same—Other Sales—Evidence.

Upon trial of pursuing the business or occupation of selling intoxicating liquors in local option territory, testimony of any and all sales made by defendant was admissible as a circumstance going to show that he was engaged in said business. Following Robinson v. State, 66 Texas Crim. Rep., 392, 147 S. W. Rep., 245, and other cases.

3.—Same—Charge of Court—Evidence—Record—Date of Sale.

Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the witnesses for the State were unwilling witnesses and could not fix the date of the different sales by the defendant, it was permissible to show by the court record of their former testimony at the examining trial the date of such sales; the court instructing the jury that they must acquit defendant if they had a reasonable doubt that he made at least two sales as charged in the indictment to persons named therein, and that he pursued the occupation, etc.

4.—Same—Rule Stated—Evidence—Recollection of Witness—Date of Offense.

If a witness had no present recollection of the fact, if he is able to refer to data which he knows was correct at the time it was made, the data may be used to prove the fact, even though at the time of the trial, the witness had no independent recollection of the fact. Following Kimbrough v. State, 28 Texas Crim. App., 367, and other cases.

5.—Same—Charge of Court—General Objections.

An objection that the court erred in submitting to the jury, paragraph 1 of the court's general charge, without pointing out the error, is too general to be considered on appeal. Following Quintana v. State, 29 Texas Crim. App., 401.

6.—Same—Intoxicating Liquor—Charge of Court—Beer.

A charge of the court that beer is an intoxicating liquor as a matter of law is proper. Following Moreno v. State, 64 Texas Crim. Rep., 660, 143 S. W. Rep., 156.

7.—Same—Number of Sales.

Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the indictment alleged four separate and distinct sales, the contention that the proof must show each of such sales is untenable, as it is only necessary to prove two.

8.—Same—Charge of Court—Definition of Occupation.

Where the court instructed the jury that in order to constitute the occupation of selling intoxicating liquors, etc., it is meant that which occupied a part of the attention and time of the defendant as a business or calling and which he pursued for the purpose of profit and gain, and that he made at least two sales prior to the filing of the indictment, the same was sufficient and not on the weight of the evidence.

Appeal from the District Court of Uvalde. Tried below before the Hon. R. H. Burney.

Appeal from a conviction of pursuing the occupation of selling intoxicating liquors in local option territory; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

G. B. Fenley and *C. Lawrence,* for appellant.—On question of the court's charge on occupation: Standfield v. State, 62 S. W. Rep., 917; Ball v. Com., 99 S. W. Rep., 326; Howard v. Com., 104 S. W. Rep., 263; State v. Sullinger, 127 S. W. Rep., 922; Gardner v. State, 57 Tex. Crim. Rep., 471, 125 S. W. Rep., 13; Thomas v. State, 57 Tex.

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Crim. Rep., 452, 125 S. W. Rep., 35; Glenn v. State, 76 S. W. Rep., 757; Brown v. State, 76 S. W. Rep., 475; Duff v. Com., 68 S. W. Rep., 390; State v. Marsh, 71 S. W. Rep., 1003.

On question of court's charge on number of sales: Ison v. Com., 66 S. W. Rep., 184; Ball v. Com., 99 S. W. Rep., 326.

On question of fixing date of sales and admitting testimony on examining trial: Martinez v. State, 9 S. W. Rep., 356; McCollum v. State, 14 S. W. Rep., 1020; Scruggs v. State, 34 S. W. Rep., 951; Hobbs v. State, 55 Tex. Crim. Rep., 299, 117 S. W. Rep., 811.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was prosecuted and convicted of following the business and occupation of selling intoxicating liquors in prohibition territory, and his punishment assessed at two years confinement in the State penitentiary.

After alleging that prohibtion was in force in Uvalde County, in proper terms, the indictment alleges that thereafter, to wit: "on or about the 15th day of July, A. D. 1909, and prior to the filing of this indictment, in the County of Uvalde, and State of Texas, one Frank Misher, did then and there unlawfully engage in and pursue the business and occupation of selling intoxicating liquor, the same not then and there being permitted by law in said county, and he, the said Franch Misher, did then and there in said county and State, on or about the 1st day of August, A. D. 1909, unlawfully sell four bottles of beer, the same then and there being intoxicating liquor, to one Roy Crane; and he, the said Frank Misher, in said county and State, did then and on or about the 15th day of August, A. D. 1909, unlawfully sell six bottles of beer, the same then and there being intoxicating liquor, to one Roy Crane; and he, the said Frank Misher, in said county and State, did during the month of August, A. D. 1909, unlawfully sell intoxicating liquor, to wit: One bottle of whisky, to one S. T. Bunting, and he, the said Frank Misher, did then and there unlawfully during the said month of August, A. D. 1909, sell intoxicating liquor, to wit: beer and whisky to one J. T. Power and to divers and various other persons, whose names are to the grand jurors unknown, and in quantities to the grand jury unknown, all of which said occupation and business of selling intoxicating liquors was in violation of said law, and which said occupation and business so unlawfully pursued and engaged in by the said Frank Misher, was not then and there permitted by law in said County of Uvalde aforesaid, against the peace and dignity of the State." This form of indictment has been so frequently approved by this court, we do not deem it necessary to discuss these questions again. Slack v. State, 61 Tex. Crim. Rep., 372, 136 S. W. Rep., 1073, and cases there cited.

In addition to proving sales to the persons above alleged, the State also proved by Josh Barker that he had bought beer from defendant

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on four or five different occasions, paying him 20 cents per bottle for it; that defendant kept the beer in a large ice-box or refrigerator, and when the box was opened witness saw a large quantity of beer in it. And by Lee Robinson, that he purchased a dozen bottles of beer from defendant on the day of his arrest. The objection urged to this testimony was, "that it was irrelevant and immaterial, for the reason that it was nowhere alleged in the indictment that the defendant ever sold to these witnesses any intoxicating liquor." The defendant was not charged with making a "sale"; this is one offense, and pursuing the business or occupation is a separate and distinct offense, made so by our laws, and evidence of any and all sales made would be admissible as a circumstance going to show that appellant was engaged in that business or occupation, as was the fact that he had a large quantity of beer on hand in his place of business in an ice-box. (Robinson v. State, 66 Tex. Crim. Rep., 392, 147 S. W. Rep., 245; Dickson v. State, 66 Tex. Crim. Rep., 270, 146 S. W. Rep., 914.) Clay v. State, 65 Tex. Crim. Rep., 590, 144 S. W. Rep., 280.

At the request of appellant the court instructed the jury: "Gentlemen of the Jury: You are instructed as a part of the law of this case that even though you should find that the defendant made two sales of intoxicating liquors to the witnesses, Josh Barker and Lee Robinson, and that said sales were made since July 11, 1909, you are bound to acquit the defendant; unless you should in addition thereto further find beyond a reasonable doubt that the defendant also made at least two sales as charged in the indictment to persons named in the indictment, and that said sales were made since July the 11th, 1909." In this case it was alleged that a sale had been made to S. T. Bunting. Bunting testified on this trial that he purchased a bottle of whisky from appellant in the summer of 1909, and paid seventy-five cents for it. He could not fix the exact time, but said that it was just about the time Hulett Bowles was killed, and that he purchased the liquor for W. R. Cook. The deputy sheriff was then introduced, and testified that Bowles was killed about the 4th day of August, 1909, and Cook testified that it was a day or two after Bowles received his death wounds when Bunting purchased the whisky for him. This testimony was all admissible. Another witness fixed the date on which he purchased the liquor as the day defendant was arrested, and the officer was permitted to state that he arrested defendant August 20th. This testimony was also admissible in order to fix the date. J. T. Powers testified that he had purchased both beer and whisky from defendant on a good many occasions, and paid him for it, but could not remember the date of the purchases, saying, "I paid him considerable money for beer and whisky, but do not now remember the amount of money nor the date of purchases." He stated he moved to Uvalde in March, 1909, and all the beer and whisky was purchased after that date and prior to the arrest of defendant. Witness remembered testifying at the examining trial, and said it may

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have been a month, six weeks or two months before the examining trial when he purchased the liquors. The State then introduced the justice of the peace, who identified the examining trial docket of his court, and said, "these entries are in my handwriting; I made them myself; I wrote the dates myself, and I know I wrote the date correctly." After which the State introduced the docket, which showed the examining trial in causes Nos. 198 and 199 were held on August 21, 1909; in No. 200 on August 23, 1909; in Nos. 201, 202 and 203 on August 30, 1909, all being cases against defendant charged with selling intoxicating liquor. The Encyclopedia of Evidence, vol. 11, page 105, lays down the rule to be: "A public officer called as a witness may refresh his memory by the entries of records in his office, which he knew at the time of making to be correctly made. The witness must be able to say that the writing is a true statement; but it is not necessary that the witness should have an actual recollection of the facts; it is sufficient that the witness is able to state the memorandum is correct." citing authorities from almost every State in the Union.

Again, another witness for the State, Roy Crane, testified to the purchase of beer from defendant during the year 1909 some time between January and September, and said he paid him for it, but in his testimony declined to fix the date of purchase, whether prior or subsequent to July 11, 1909. He was then asked if he testified at the examining trial, and being shown his testimony at the examining trial, said that it did not refresh his memory to the extent of rendering him able to testify positively to the date of purchase, independent of and without referring to this testimony. He stated, however: "I know I testified correctly at the examining trial, and I signed the testimony that was written down. I signed this document myself. At the examining trial I detailed the facts and told the truth, and I suppose the document I hold in my hand, which was signed by me, contains a correct statement of my testimony at the examining trial." After thus testifying the State was permitted to prove that the date set forth in the instrument was August 15, 1909, as the date of purchase by witness from defendant. In Vol. 11 of the Encyclopedia of Evidence the rule is stated to be: "If a witness, on looking at a writing, is able to testify that he knows the transaction therein noted took place, though he has no present memory of it, his testimony is admissible," citing 8 Ala., 9; 182 Mass., 463; 20 Mo. 473; 9 New York Sup., 607; 72 S. C., 74; 12 Am. Dec., 643; 56 Ver., 426; 57 Pa., 421. and in 20 Wis., 412, the court said: "We think the sounder and better rule to be that if the witness can swear positively that the memoranda or entries were according to the truth of the facts, that is sufficient, though they may not remain in his memory at the time he gives the testimony. He may testify from the entries, and when he does so, he swears positively to the truth of the facts in them." In this work, beginning on page 95 and down to and including page 107, will be

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found an extensive treatise on this question, and a long list of authorities holding that the court did not err in admitting this testimony. The same rule is laid down by Mr. Underhill in his work on Criminal Evidence, in sec. 217, where will also be found a list of authorities sustaining the text. Mr. Wharton, secs. 516, et seq., says a witness may refresh his memory by memorandum, and it is not fatal that now witness had no recollection independent of the memorandum.

Mr. Greenleaf, in his work on Evidence, treats of this question in secs. 436 and 437, and says: "Where the witness recollects having seen the writing before, and though he now has no independent recollection of the facts mentioned in it, yet he remembers that at the time he saw it he knew the contents to be correct, it is admissible." In his case the witness recollects distinctly testifying at the examining trial; that his testimony was taken down in writing and signed by him, and he identifies his signature to this instrument, and he recollects that at that time he correctly stated the date of purchase, although at the time of this trial he does not now remember the date, but does remember making the purchases, and under such circumstances it was permissible to prove the date as was done in this case. This question is treated of by Judge White in Kimbrough's case, 28 Texas Crim. App., 367; by Judge Davidson in Stringfellow's case, 42 Texas Crim. Rep., 588, and by Judge Brooks in Arnwine's case, 54 Texas Crim. Rep., 213, and in all of them it is held that if the witness has no present recollection of the facts, if he is able to refer to data which he knows was correct at the time it was made, the data may be used to prove the fact, even though at the time of trial he has no independent recollection of the fact, and by the United States Supreme Court, in the case of Putnam v. United States, 162 U. S., 687, this question is treated at length. In this case it is true the date of sale and purchases was a material fact to be proven. The law under which appellant was prosecuted became effective July 11, 1909, and the defendant was arrested and had an examining trial the latter part of August, 1909, and it was necessary to prove that the defendant was engaged in the business and occupation subsequent to July 11, 1909, and prior to the return of the indictment herein, consequently the sales sought to be proven must have been subsequent to July 11, 1909. When the trial takes place long after the transaction, it is not remarkable that the witnesses could not name the date of sale,—while he would remember distinctly the purchase of the commodity. None of us would hardly retain in our memory the distinct date. In addition to this, the court, in approving the bills, states the witnesses were unwilling witnesses, and adverse to the State, and under such circumstances, where the witnesses were unwilling to fix the date of purchase, but would state facts and circumstances by which the dates could be fixed, it was permissible to resort to this character of testimony to fix the date. In one instance the witness stated positively he purchased whisky, but could not name the date of purchase; however, he did

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state that it was on the day defendant was arrested. Another stated he purchased beer, but could not fix the date, but said it was within four or six weeks prior to the date of the examining trial. It was then permissible to show by the court records the date of the examining trial. In another instance the witness would not fix the date, but said at the examining trial he had testified to the date correctly, and the testimony was reduced to writing, and it was permissible to prove the date by this record.

The court in his charge instructed the jury that they must believe beyond a reasonable doubt that defendant engaged in the business or occupation after July 11, 1909, and prior to the filing of the indictment in this case, and, in addition thereto, made at least two sales of intoxicating liquors to parties named in the indictment within that period of time, or they would acquit him.

Those paragraphs of the motion reading: "the court erred in submitting to the jury paragraph one of the court's general charge," pointing out no error in the paragraph, are too general to be considered. (Quintana v. State, 29 Texas Crim. App., 401.)

The complaint that the court erred in charging the jury as a matter of law that beer is an intoxicating liquor, has been decided adversely to appellant's contention. (Moreno v. State, 64 Tex. Crim. Rep., 660, 143 S. W. Rep., 156.)

The complaint that, because the indictment alleged four separate and distinct sales the proof must show each of such sales was made, is not tenable. It was only necessary to prove that appellant was engaged in the occupation and made two of the sales alleged to have been made, and the court did not err in so instructing the jury. Acts 31st Legislature, chap. 15, page 284.

The court charged the jury: "In order to constitute the occupation or business of selling intoxicating liquors, as alleged in the indictment in this case and as prohibited by law as set out in paragraph one of these instructions is meant that which occupied a part of the attention and time of the defendant as a business or calling, and which business he pursued for the purpose of profit and gain, and it must also be shown in addition to this, if at all shown, it must be shown that at least two sales of intoxicating liquors had been made by the defendant in Uvalde County, Texas, subsequent to July 11th, 1909, and prior to the filing of the indictment herein.

"Now gentlemen of the jury, bearing in mind the foregoing instructions, if you find and believe from the evidence beyond a reasonable doubt that the defendant, Frank Misher, in Uvalde County, Texas, and on or about the time alleged in the indictment, and after the 11th day of July, 1909, and prior to the 7th day of April, 1911 (date of filing the indictment herein), did unlawfully engage in and pursue the business of selling intoxicating liquors, as these terms have been hereinbefore explained to you, and you further find from the evidence beyond a reasonable doubt that the defendant in Uvalde County,

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Texas, and on or about the times alleged in the indictment and in each and every instance, since the 11th day of July, 1909, did make two separate and distinct sales of intoxicating liquors as alleged, to at least two of the parties whose names are set out in the indictment, then and in case you so find, you will find the defendant guilty as charged in the indictment, and assess his punishment at confinement in the penitentiary for any time not less than two nor more than five years, and unless you so find you will acquit the defendant."

The objections to these paragraphs are: (1) That the court did not require the jury to believe that the sales were made before the filing of the indictment. The court does so instruct the jury in the first paragraph herein copied. (2) The next criticism is that these paragraphs are upon the weight of the testimony. We think a careful, if not a casual, reading of them will demonstrate that such complaint is not well founded. In the first paragraph the court is defining occupation or business, and while some expressions may be inapt, yet such charge is not subject to the criticism that it is upon the weight to be given the testimony. (3) The other criticism, that it only required two sales to be proven, while the indictment alleged more than two, has heretofore herein been discussed.

We have carefully studied this record, and the evidence adduced on the trial, and are fully convinced that the evidence supports the verdict.

The judgment is affirmed.

Affirmed.

[Rehearing denied January 29, 1913.—Reporter.]

Charlie Green v. State.

No. 2180. Decided January 29, 1913.

Rehearing denied February 19, 1913.

Robbery—Statement of Facts.

Where, upon an appeal from a conviction of robbery, it was not shown that the defendant had been deprived of a statement of facts through no fault of himself or counsel, there was no reversible error.

Appeal from the Criminal District Court of Harris. Tried below before the Hon. C. W. Robinson.

Appeal from a conviction of robbery; penalty, six years imprisonment in the penitentiary.

The opinion states the case.

J. Vance Lewis, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

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HARPER, JUDGE.—On June 4, 1912, this case was tried in the Criminal District Court of Harris County, Texas, and appellant convicted of robbery and his punishment assessed at six years confinement in the penitentiary.

There is no statement of facts with the record, and appellant requests us to reverse the case because he has been deprived of a statement of facts. It is only in those cases where through the fault or negligence of the State's counsel, or the omission or wrongful act of the judge trying the case, the defendant has been deprived of a statement of facts, we would be authorized to reverse on this ground. While there are some affidavits which would indicate that appellant had done all the law required of him to entitle him to a statement of facts, yet the judge of the Criminal District Court has filed in this court the following affidavit:

"On this day personally appeared before me Cornelius W. Robinson, judge of the Criminal District Court of Harris County, Texas, who after being by me duly sworn upon oath, says:

"That a motion for a new trial in this case was overruled on the 14th day of June, 1912; that thereafter on the 20th day of July, 1912, J. Vance Lewis, attorney for Charlie Green presented to me an affidavit stating that the defendant was too poor to pay for a statement of facts to be prepared by the stenographer, and upon said date I refused to order the stenographer to make up a statment of facts, more than thirty days having elapsed from the overruling of the motion for a new trial, and this court holding session more than eight weeks. I stated to J. Vance Lewis, however, that if he would prepare a statement of facts and present it to the district attorney and they would agree on a statement of facts, that I would approve the same and have it sent up with the record and the higher court could use their judgment as to whether it should be considered; the said J. Vance Lewis at no time reported to me that he was unable to agree with the district attorney on a statement of facts and in fact I heard no more with reference thereto until on or about the 13th or 14th day of December, 1912, when Mr. Clarence Kendall, Assistant District Attorney for Harris County, brought to me a statement of facts that he said Lewis had left in his office some time the latter part of July, 1912.

"Had the said J. Vance Lewis reported to me that he had failed to agree with the district attorney upon a statement of facts in this case I should have made up a statement of facts and filed the same and had it sent up with the record."

The assistant district attorney has also filed an affidavit denying that he ever refused to agree with appellant's counsel on a statement of facts. Under the circumstances we do not feel we would be authorized to reverse the case on this ground.

The judgment is affirmed. *Affirmed.*

[Rehearing denied February 19, 1913.—Reporter.]

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Jack Jones v. State.

No. 2244. Decided January 29, 1913.

Obstructing Public Road—Insufficiency of the Evidence.

Where the obstruction was not placed in the public road, but on a passage way adjoining the same, the conviction could not be sustained.

Appeal from the County Court of Morris. Tried below before the Hon. C. M. Henderson.

Appeal from a conviction of obstructing a public road; penalty, a fine of $100.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, Judge.—Appellant was prosecuted and convicted of obstructing a public road.

As the place where the obstruction is shown to have been placed is conclusively shown by the evidence not to have been in the public road as created by the Commissioners' Court, but on a passage way adjoining the road, owned by appellant, and it not being shown that the passage way had been dedicated to public use, the evidence will not sustain a conviction.

Reversed and remanded.

R. P. Butler v. State.

No. 2236. Decided January 29, 1913.

Adultery—Recognizance—Punishment.

Where the recognizance failed to state the amount of punishment, the appeal must be dismissed on motion of the State.

Appeal from the County Court of Raines. Tried below before the Hon. O. H. Rodes.

Appeal from a conviction of adultery; penalty, a fine of $250.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, Presiding Judge.—On motion of the Assistant Attorney-General the appeal in this case must be dismissed. The recognizance is insufficient in that it fails to state the amount of the punishment. The statute requires that this shall be done.

For the reason indicated the motion to dismiss the appeal is sustained.

Dismissed.

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FRANCISCO RIOS, ALIAS RIES, v. STATE.

No. 2204. Decided January 29, 1913.

Theft—Insufficiency of the Evidence.

Where, upon trial of theft, the evidence did not show with any degree of certainty that defendant was the man who stole the alleged horse, if it was stolen, the evidence was insufficient to sustain a conviction.

Appeal from the District Court of Hays. Tried below before the Hon. R. E. McKie, Special Judge.

Appeal from a conviction of theft of a horse; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—This is a horse theft case. The alleged owner, Monta, testified that defendant had worked for him at different times for a couple of years before the alleged theft; that on the night his horse disappeared somebody came to his house, accompanied by another party; that there were two shots fired that night by a man that he says he recognized as defendant and these shots were fired at him, or the cot on which he usually slept; that he recognized the defendant as being the man who did the shooting and that he heard some conversation between the two parties. This is the language of the witness in this connection: "It was this boy, and the other fellow that was with him says, 'Let me put my shoes on' and when he got his shoes on the other fellow started the other way and he says, 'No, hold on, don't go that way,' and he turned and went and as they went off this fellow here says, 'Ha! Ha! I shore got him!' Then they went off and I went and looked in the lot and I couldn't see my horse. I had had him in the stall, and I thought my boy turned him out and the next day I asked him; I asked the boy where he was and he said that he didn't know where he was, and he said that he hadn't been in the lot. I went then and looked on the inside of the lot and I found the back part of the lot where there was a wire gap taken out, and they had slipped the horse through that wire and hooked the wire gap and then jumped on the horse right there; the ground was wet then and I knew whose tracks it was. I knew his tracks and I had a pretty good idea that he was the man; I didn't see him get the horse. I have never seen the horse since that time. The shot that he shot at me, we found inside of the water barrel; it went right over my cot where I had been sleeping; I wasn't sleeping there then; I had been sleeping there for about seven weeks; that night I had gone into the house about ten o'clock." The animal that the witness says he lost "was not altogether a horse; that it was a mare." "I don't remember the brand

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on that horse. This was the twentieth of September last year that I lost my horse. I haven't heard anything, except just to hear of her; I have heard of her, that is all; I don't know myself." He states that somebody had told him that defendant sold a horse in New Braunfels. This is the substance of the State's case. No witness ever saw the defendant in possession of the horse and no witness is produced to show that the animal was ever in New Braunfels, or shows that she was sold there. The name of the witnesses who told him were not given and the State did not produce them. Defendant borrowed a saddle from a man by the name of Salalar. The time of borrowing the saddle is left very indefinite, but this saddle was subsequently brought to the barber shop of a man named Benito Lopez, who says it was brought there in the last days of August, and that some time after the 16th of September he sold this barber shop to another Mexican and there came up some trouble between them as to whether or not the saddle went with the shop when the shop changed hands. This is a sufficient statement of the evidence and on this it is suggested that the evidence is not sufficient.

We are of opinion that the contention is correct. The evidence should show with some degree of certainty that appellant was the man who stole the horse, if it was in fact stolen. The witness for the State, the alleged owner, states the horse disappeared the night defendant was there and shot at him, but no witness ever saw defendant in possession of the horse and there is nothing further than that to connect him with the theft of the horse if stolen. If as a matter of fact appellant had a horse and sold it in New Braunfels, as the witness says somebody told him, that matter could have been ascertained and the evidence secured, but there was no attempt to do this so far as this record is concerned. We are not willing, on this character of testimony, that a man should go to the penitentiary. The State must make out a reasonable case against defendant. In cases of circumstantial evidence the rule is well adjudicated that the circumstances must be sufficiently strong and cogent to exclude every other reasonable hypothesis, except the guilt of defendant.

The judgment is reversed and the cause remanded.
This evidence does not meet the requirements of the law.

Reversed and remanded.

P. WINGATE v. STATE.

No. 2028. Decided November 27, 1912.

Rehearing denied January 29, 1913.

1.—Assault to Rob—Charge of Court—Alibi.

Where, upon trial of assault with intent to rob, the State's evidence, sustained the conviction, there was no error, although defendant attempted to show an alibi which the court properly submitted to the jury.

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2.—Same—Motion for New Trial—Bill of Exceptions.

Where the motion for new trial was based on many grounds, and appellant's bill of exceptions was to the court's action overruling said motion, the same cannot be considered on appeal.

3.—Same—Evidence—Bill of Exceptions—Identification.

Where defendant's bill of exceptions did not point out the error as to the admission of testimony concerning the identification of defendant, the same cannot be considered on appeal; besides, such identification at the police station was an established fact.

4.—Same—Evidence—Pistol.

Upon trial of assault with intent to rob, there was no error in introducing testimony that the officer found a pistol near the scene of the attempted robbery; there being other testimony that defendant had a pistol at that time.

5.—Same—Evidence—Confessions—Contradicting Witness.

Where, upon trial of assault with intent to rob, defendant introduced as a witness one of his alleged companions who was shown to have been with him at the time, for the purpose of proving an alibi, there was no error in permitting the State to introduce the confessions of said witness, which completely proved the fact of the attempted robbery by the defendant; the court properly limiting such testimony to the purpose of impeachment.

6.—Same—Charge of Court—Principals.

Where, upon trial of assault with intent to rob, the evidence showed that other persons acted together with defendant in the alleged offense, the court correctly charged on the law of principals.

7.—Same—Charge of Court—Specific Intent to Rob.

Where the court's charge required an assault with intent to then and there by such assault and violence to rob the party injured, a complaint that the court's charge failed to instruct on specific intent to rob was untenable.

8.—Same—Indictment.

Where, upon trial of assault with intent to rob, the indictment followed approved precedent, the same was sufficient.

9.—Same—Highest Penalty.

Where, upon trial of assault with intent to rob, the jury fixed the highest penalty for this offense and the evidence supported the verdict, there was no error.

10.—Same—Stating Facts—Practice on Appeal.

Where the motion for rehearing pointed out errors in the statement of the facts in the original opinion which could not change the result, there was no error in overruling same on this ground.

11.—Same—Confessions—Impeaching Witness—Charge of Court.

Where the alleged confessions introduced in evidence were not those of defendant, but those made by a companion and were introduced to impeach the latter's testimony with reference to defendant's alibi, there was no error; the court properly limiting such testimony for the purposes of impeachment.

Appeal from the Criminal District Court of Galveston. Tried below before the Hon. Robt. G. Street, Acting Judge.

Appeal from a conviction of assault with intent to rob; penalty, ten years imprisonment in the penitentiary.

The opinion states the case.

O. S. York, for appellant.—On question of identification: Walker v. State, 50 Texas Crim. Rep., 221; Trevenio v. State, 48, id., 207.

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On question of introducing confessions of codefendants: Walton v. State, 41 Texas Crim. Rep., 454; Garza v. State, 38 Texas Crim. Rep., 317.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—Appellant was convicted of the offense of an assault with intent to rob J. Gothier on or about March 4, 1912, and his penalty fixed at ten years in the penitentiary.

Appellant's defense was alibi. This was correctly submitted by the court to the jury and found against him.

A brief statement of the facts only is necessary. About 11 o'clock at night on said date charged, an old gentleman by the name of Gothier was passing along one of the public streets in the City of Galveston about a block from one of the city street electric lights. Three negro men, apparently together, met him. One of them asked him for a match. He felt in his pocket, got the match and handed it to that one. Then another of the three asked him for a match and he likewise furnished him a match. The third at once, they all being right near him, drew a pistol,—a six-shooter,—presented it towards him and demanded that he holds up his hands. Instead of doing so, the old man struck the pistol in this negro's hands and knocked it out of his hands close to a brick wall, where a pistol was found the next morning. Immediately upon striking the pistol from the negro's hand, appellant ran from the scene as rapidly as he could hallooing "police, police." In about a half block from where the assault occurred he met a man and his wife to whom he then and there told what occurred and the manner of its occurrence. He was then greatly excited. There were two patrol policemen near this scene, but neither of them saw the actual occurrence. Immediately upon the old man striking the pistol from the negro's hand and running, the three negroes themselves ran away from the scene, appellant going in one direction and the other two in another. These policeman saw these parties running away from this scene and identified and swore positively to the identity of the appellant as one of them. The police at the time they saw appellant running away from the scene and the others too, did not know and up to that time had no information that this assault had been committed upon this old man, but very soon thereafter, having telephoned into headquarters as was their custom from time to time, were informed of it, it having been telephoned to police headquarters by the man with his wife, to whom Gothier ran and told of it immediately after it occurred. In the meantime, the two officers who saw the other two parties other than appellant suspected that something had occurred or else they would not have been running away as they were, undertook to arrest them. They did not submit to arrest and declined for the time being to be arrested by the police who attempted it. Other policemen came

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to their relief from different directions and these other two parties, or one of them backed into those coming to the rescue and was arrested by them. In a few hours afterwards, appellant was also arrested at his rooming house, he then having gone to bed. They were all three taken to the city prison and kept until next morning. The old gentleman having been informed of it, went down, or was taken down for the purpose of ascertaining the identity of these parties and whether they were or not the parties who assaulted him the night before. Upon arriving there, he at once identified the three as the persons who had assaulted him and identified appellant as the one who had drawn and presented a pistol on him and demanded that he should hold up his hands. As stated above, the policemen also identified appellant as one of the persons who were seen running away from the locality where the assault had been committed just after it had been committed. The old gentleman, on the trial, and this policeman and others positively and unequivocally identified appellant,—the old man, as the party who assaulted him and drew a pistol on him and the others as the men seen running away from the locality of the assault just after it had been committed. The evidence is clearly and amply sufficient to sustain the verdict.

Numerous witnesses, for appellant testified that he was at his boarding house all the night of the robbery. They did not agree among themselves in all particulars as to where he was and what he was doing at the time from 8 o'clock at night till after the assault. However that may be, the jury, as they had the right, disbelieved his witnesses testifying to his alibi and believed the State's witnesses, who clearly identified him as one of the parties who committed the assault.

Appellant has only four bills of exception in the record. The first is to the court's overruling his motion for new trial. His motion for new trial is based on many grounds. We cannot consider that as a separate bill.

The second bill states that the State introduced the following testimony, to wit (Testimony of W. B. Wilkerson):

"Q. State whether or not at the time the old man identified these three men as the men who held him up? Judge York: I object to that. The court: Objection overruled. Judge York: Defendant excepts. A. Yes, sir. Q. Which one did he state, if he stated any, was the one that had the gun? Judge York: I object to that. The Court: Objection overruled. Judge York: I except. Q. Which one did he point out as the one with the gun? A. Wingate." The grounds of objection stated are that it was inadmissible for the State to attempt to have the complaining witness identify appellant at the police station while he was under arrest, forcing the defendant in that way and manner to testify against himself and the testimony was simply bolstering up the testimony of the complaining witness. It will thus be seen by this bill that it is so meager and does not comply with the

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rules of the court universally acted upon as to authorize or require this court to consider it. It does not set out any of the proceedings in the court so as to enable this court to determine whether an error has been committed or not. It does not show who the witness was, when or where the circumstances were, or anything else that therefrom this court can tell any error was committed. Sec. 857, p. 557, and sec. 1123, p. 732, of White's Ann. C. C. P. Besides this, the court, in approving the bill, qualified it by stating that the record shows that "by other competent testimony introduced without objections, the fact of appellant's identification by the complaining witness at the police station was an established fact. It was uncontradicted." The bill, without the qualification, and especially with it, shows no reversible error.

The next bill, No. 3, is just as insufficient to require the court to pass upon it as the other. We get from it, however, that the appellant complained that the State could not prove by a police officer that he found in the street the next morning after this assault at night, a pistol just where this assault is alleged to have been committed. This evidence was competent and the court did not err in admitting it.

Appellant's other bill complains that the court erred in permitting the confession of one of the three persons who committed the said assault, showing completely the facts and in substance as testified to by other State's witnesses and the assaulted party. This bill is likewise defective as the others. The court, in qualifying it, shows that the confession was offered and admitted as impeaching evidence, the record showing, as referred to by the court that the appellant introduced Coleman as a witness who testified that he was one of the three who were indicted for this same attempted robbery and that not only he was not there, but that the appellant was not there on the occasion of the robbery and by his testimony proved an alibi for the appellant. On cross-examination the State produced and identified this witness' written confession at the time of his original arrest and asked him if he did not at that time make those statements which would have shown the falsity, or, in contradiction, of his testimony on this trial. The effect of his testimony is to admit the execution of his signature to this confession and that he made it, but he claimed that it was made under duress. One of the officers present testified fully showing that it was not made under duress, but was voluntary and after a full warning as it purported to be on its face. The confession was in the form as required by our statutes on the subject. It was offered by the State and admitted by the court at the time, solely for impeachment purposes, of the testimony of this witness. It was clearly admissible for that purpose even if the bill was sufficient to raise the point and require this court to pass thereon. Besides, the court in his charge, aptly and correctly told the jury that it could be considered by them only for the purpose of impeaching the testi-

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mony of said witness and could not be considered by them as evidence against the appellant or for any other purpose than for impeaching said witness.

The evidence called for and the court correctly gave a charge on the question of principals and correctly applied the law to the facts of this case.

There is nothing in appellant's complaint in his motion for new trial that the court did not charge that the jury must believe that there was a specific intent on the part of the defendant to rob Gothier, for the court did specifically charge that they must find from the evidence beyond a reasonable doubt that appellant, in connection with the said other two persons, did make said assault "with the intent then and there by such assault and by violence," etc., to rob the said Gothier.

The indictment in this case follows precisely that laid down by Judge Wilson in sec. 1062 of his Ann. Penal Code and has been approved by the decisions of this court some of which are cited in his next section. Notwithstanding some of appellant's assigned errors are not presented so as to require this court to consider them, we have considered them all and find that none of them present reversible error.

It is true that the jury fixed the highest penalty for this offense. The amount of the penalty under the law is left to the jury and not to this court. There is nothing in the record and nothing shown by appellant's contentions that indicate to this court that the jury in affixing the penalty did not act properly and were not justified by the facts.

The judgment is affirmed.

Affirmed.

ON REHEARING.

January 29, 1913.

PRENDERGAST, JUDGE.—Appellant, in his motion for rehearing, calls our attention to some errors in the statement in the original opinion summing up the facts. The motion for rehearing aids us in correcting some of them which we cheerfully do. They are mostly of collateral matters and we think do not affect the material questions and decision of the case. For instance, in the orginal opinion in summing up, we incorrectly stated that *appellant* ran from the scene as rapidly as he could hallooing "police, police." Of course, *appellant* did not do this. It was Gothier, the assaulted party, who did this. The other facts stated would doubtless show that this was a mistake, but we correct it now. We also stated that when the appellant presented the pistol Gothier struck it and knocked it out of his hand. Perhaps this was stating it too strongly. Our attention is called to the fact that he, on cross-examination, testified that he did not know

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whether he knocked the pistol out of appellant's hand or not. Reviewing the testimony again we are inclined to believe he did not knock the pistol out of appellant's hand, but that the appellant or one of the assaulting parties, after getting about a block from where the assault was committed, threw the pistol away, at the place, and as otherwise stated in the original opinion.

It is always difficult and sometimes impossible for this court to get distances, courses and positions of persons and things from a statement of facts. From this record, after carefully considering it again. we agree with appellant's attorneys, we can not tell "whether running up 31st street is going north or south * * *" And "appellant can not say, and neither can appellant's attorney says, whether they were going north or going south." That is, when the three parties committing the assault were leaving the point where the assault was committed. The streets and localities, and whether there were any buildings on the streets or obstructions so as to prevent persons from seeing, are not disclosed by the record; neither are the distances given or disclosed. The testimony of the witnesses speaks of 30th street, H street, 31st street, Winnie street, Market street, Broadway, 33rd and so on. Doubtless the jury and the lower court were familiar with all of this and could readily understand the witnesses when they were testifying about what happened and what they saw, and whom they saw at certain streets and places on them. Taking the testimony as a whole, we think it is certain and clear that the assaulted party, Gothier, after he struck the pistol in the hands of appellant who presented it on him and demanded that he hold up his hands, ran something from between a half block to a block and a half hallooing "police"; that the appellant and his two companions, the three implicated in the assault on Gothier, also ran from the scene. None of them went in the direction that old man Gothier did and it seems that while they all may have started the same direction, they separated, two going on one side and appellant on the other side of one of the streets and that the policeman who saw them and identified them when they were running away, did so within about a block, more or less, of the place where the assault was committed. The officers testified they saw them running away and assumed that something unusual had occurred; they did not know then that old man Gothier had been held up or attempted to be held up by them, but saw and identified, as one of the persons who was running away from the locality where the assault had been committed, the appellant. There is no question about this. Whether they went one block or two blocks or within those distances, or went North, South, East or West, or up or down, or on what street, can not be material to the decision. Appellant claims (his defense was alibi) that he was not at or anywhere near the place of the assault and did not commit it, but that he was some distance from the place in bed asleep and had been so for hours continuously before this. That

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the State's witnesses clearly and positively identified him as the party who tried to hold Gothier up, and he and others as near this scene running away from it, immediately after the assault was committed, there can be no question. So that while the court in summing up the testimony in the original opinion may have been in error in stating some of the facts, the material facts are clearly shown.

The only ground of complaint in his motion for rehearing is that the court was in error in holding that the confession of Coleman, one of appellant's witnesses, was admissible in evidence. We restate this question again briefly. Appellant's defense was alibi. Among other witnesses, in order to establish it, he introduced Coleman, who testified for him that at the time and for hours before the claimed assault on Gothier, appellant was in bed at a certain house some distance from where the assault was committed. This was important testimony in appellant's behalf by this witness. The State then was permitted to ask him if on the next day after the night of the assault, he did not make a written statement, or confession and in that state the facts and show that appellant was present and was one of the parties who committed the assault on Gothier at the time and place at which Gothier had testified it had occurred. Witness first denied making any such statement. When confronted with his written confession to that effect he would first deny that he made it and then would say that he did make it, but claimed that it was made under duress and by force by one of the officers. Then the State proved by one of the officers that the statement or confession was made by the witness and that it was voluntarily made and no duress or force whatever was used to obtain it. After this the statement was permitted to be introduced over appellant's objections, the court stating at the time, that he permitted its introduction for impeachment purposes of this witness solely, and correctly so charged the jury in his charge. We apprehend that appellant does not make the distinction between the impeaching of this witness by his previous written sworn statement contradicting his testimony on the trial from a confession of appellant. Of course, if it had been appellant's confession and he had either denied making it, or claimed that it was under duress, force, etc., then it would have been the duty of the court to have instructed the jury that if the confession was obtained by force and duress, not to consider it at all. But that was not necessary when a witness and not the appellant is attempted to be impeached. The court gave the only proper charge on the subject. Clearly the confession or statement was admissible to contradict Coleman's testimony given on this trial, which it directly did.

The motion is overruled.

Overruled.

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ED BOWEN V. STATE.

No. 2235. Decided January 29, 1913.

1.—Gaming—Insufficiency of the Evidence.

Where, upon trial of playing a game of cards in violation of law and unlawfully remaining in a gambling house, the evidence was insufficient to sustain a conviction, the judgment must be reversed and the cause remanded.

2.—Same—Exculpatory Evidence.

Where, upon trial of violating the gaming laws, the State introduced exculpatory evidence and the defendant denied the offense, and the State could have procured witnesses to disprove such exculpatory testimony if untrue, but failed to do so, the conviction could not be sustained.

Appeal from the County Court of Guadalupe. Tried below before the Hon. J. M. Woods.

Appeal from a conviction of a violation of the gaming law; penalty, a fine of $50.

The opinion states the case.

H. E. Short and *Jas. Greenwood* and *E. E. Fischer,* for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was charged with unlawfully playing a game of cards in a room adjoining and attached to a public place where people were assembled for the purpose of amusement, and also that he unlawfully went into and remained in a gambling house where people resorted for the purpose of gaming and where people were playing cards and shooting dice, said place being attached to a public dance hall.

There is no evidence that appellant played cards, as we understand this record. The jury must, therefore, have convicted him of going into a room and remaining where cards were being played, but be this as it may, the facts were in substance as follows: On the night of the arrest of the appellant, Patton, a deputy sheriff, and Medlin, the sheriff of Guadalupe County, were in the town of Marion where the matter is said to have occurred and went to the room where appellant was arrested. Patton testified that some two weeks prior to the transaction, which formed the basis of this prosecution, he went to the dance hall, and looked through the window of one of the rooms and saw some parties gambling, but defendant was not one of them; that witness was on the outside of the building, went around to the door of the dance hall and saw the defendant keeping door to the dance hall; that defendant was on the gallery on the outside. The officer informed appellant that parties were gambling and appellant said he would stop it; the officer told him he would stop it himself and started towards the room where the gambling was going on and appellant started with him; the officer pushed him back. There

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was no arrest made on this occasion. Upon the entrance of the officer the lights went out and the parties escaped. Appellant had rented the house from Mr. Krueger, a reputable citizen of the town of Marion and kept the place for cotton pickers to spend their Saturday evenings and lodge Saturday night and, for the lodging charged 50c and for entrance to the building 15c. In that part of the building called the dance hall these parties would dance and have a social function. These matters occurred on Saturday night during the cotton picking season. This officer also testified that he spoke to appellant about the gambling and appellant said he did not know there had been any gambling, and did not permit gambling in the house and would try to prevent it in the future. About two weeks after the above occurrence, the same officer testifies, that he went to the dance hall and broke open a door in a room adjoining the dance hall, by running against it and throwing the weight of his body against it; that he did not turn the latch and did not know whether it was locked or not; that as he entered the room he saw appellant near a table with a deck of cards in his hands; that he appeared to be rising from a chair; that the chair was behind him and the table in front of him. The officer could not say whether he had been sitting down or not; that appellant left the cards on the table and picked up some money from the table. The officer did not examine the cards to see what kind of cards they were; that appellant had a small tin box with some money in it, which he afterwards gave to his wife at the depot. He says, "We never examined this box to see what was inside of it. We arrested several other parties that were in the same room with the defendant that same night. We saw none of the parties in the room gambling or playing at any game with cards or dice. We found a pair of dice on one of the tables. There were three tables in the room. We also took some dice out of the pockets of some of the parties arrested, but not out of the pocket of the defendant." Medlin testified that he was sheriff of the county and that when Patton, deputy sheriff, pushed the door open in the room adjoining the dance hall, he went in with Patton; that when he went in he saw appellant at the table; that he had his hand on a deck of cards lying on the table; that he was not playing cards, nor did the witness see anyone playing cards or shaking dice in that room during that night; that defendant was standing near the table leaning over as if he had just gotten out of his chair; that he did not know whether he had been sitting down or not; that they then arrested the defendant and every one in the room; that they got dice out of the pockets of some of the parties arrested, but none out of the pocket of defendant. Defendant took the stand and testified in his own behalf that he rented the hall in Marion from Mr. Krueger; that he gave a dance in it every Saturday night and charged an admission fee of 15c; that he also had twelve rooms connected with the hall which he rented for 50c apiece for each night; that there was also another room with three tables

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in it where he served soda water and parties sometimes drank beer which they purchased from a nearby saloon; that this room was open to the public and never locked, and people could come and go whenever they wished; that he never played cards in the room, or allowed anyone else to play in the room or any other room connected with the building. "On Saturday night, September 14th, I gave a dance in this hall, I have rented from Mr. C. A. Krueger and charged each one in an admission fee of fifteen cents. I was door keeper on this occasion, when a boy informed me that someone was playing cards in the room adjoining the dance hall where I have my tables. I immediately after being so informed about the card playing, placed someone else at the door to collect admission fees and went back to this room to put a stop to the card playing; and when I got there I saw two parties playing cards. I took the game to be 'coon can.' I took the cards away from them and told them that they could not play cards in my house, that I had promised Mr. Sam Patton, the deputy sheriff, that I would not allow card playing in this house; and just about this time Mr. Patton and Mr. Medlin pushed the door open and rushed in and arrested all of us. No one was playing cards when the officers came in, as I had stopped them before the officers came in. When they came in I had a tin box under my arm with some money in it that I had taken in at the door of the dance hall; and I gave this box and contents to my wife at the depot. They brought me to Seguin that night and placed me in jail and would not allow me to give bond in Marion which I could have done." This is a sufficient statement of the case.

We are of opinion this evidence does not show, with sufficient certainty, that appellant was engaged in a violation of the gaming laws. The officers did not see appellant playing cards and promptly so testified. The facts upon which the State, and all the facts upon which the State could claim this conviction, would be the fact that appellant was in the room where he was found and arrested and the suspicious circumstances detailed by the officers tending to show that gaming had been going on. It may be doubted that this would be sufficient evidence to justify the conviction, but as explained by defendant,—and about this there is no contradiction,—he was in no way connected with the card game, but had gone in there for the purpose of breaking up the game and had just broken it up when the officers came in. If this was not true, or the State questioned this, defendant placed it within the power of the State to disprove his statements. The State also, through its witnesses, placed it within the power of the State to have shown that it was false. The other parties who were arrested, could have been used as witnesses, under the gaming law, and compelled to testify. If appellant had been engaged in a game at the time, or was in the room watching the game, and permitted it in any way, these witnesses could have been used to so show, The suspicious circumstances against appellant, stated by the

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officers, were explained by appellant and no contradiction sought to be made. It was appellant's business, having charge of the house, to see that gaming was not going on. He explained his presence by stating and swearing that he was there to interfere with and break up the game that was being played and that he did interfere with and break it up and just as he did this, the officers came in upon him. In this attitude of the record, the State should have introduced evidence showing that appellant's evidence was not true, or at least should have met, as they could have done, his testimony bearing upon this phase of the case. The verdict of the jury is not sufficiently supported by the evidence.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

GOVNOR PEACE v. STATE.

No. 2221. Decided January 29, 1913.

Theft—Insufficiency of the Evidence.

Where, upon trial of theft, the evidence did not show that the defendant had in his possession any of the alleged stolen property or that he had ever taken same, and the property recovered was never identified as being that alleged to have been stolen, the conviction could not be sustained.

Appeal from the County Court of Tarrant. Tried below before the Hon. R. E. Bratton.

Appeal from a conviction of theft; penalty, a fine of $50 and thirty days confinement in the county jail.

The opinion states the case.

Martin & Smith, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—The evidence in substance is that Monnig, the alleged owner, was in the mercantile business in Fort Worth and was in full control of the mercantile establishment and had given appellant or no one else any authority to take any clothing from the establishment. Appellant was charged with fraudulently taking a suit of clothes of the value of $12. Appellant was in Monnig's employ. The witness said he knew nothing of any clothes having been stolen from him. The witness knew nothing of the matter one way or the other. Walker testified that he was in the employ of Monnig; that on Friday before the Wednesday night appellant was charged with the offense, he noticed him and another negro named Smith together a number of times which aroused his suspicion; that on the day appellant was charged with the offense a little Mexican had found a suit of clothes in a box on the lot leased by Mr. Monnig

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back of his store; witness and Mr. Wandry, another employe of Monnig, agreed to watch and see if appellant would come and get the clothes; that about 7:30 that evening he was standing in the third story window of the store and saw defendant and Smith come into the alley back of the store; that they had a lunch in a little bundle and a bucket of beer; that he saw defendant go to one of the boxes in the alley and shove one box off another and fumble around a while and then take out a bundle wrapped in brown paper and give it to Smith; appellant then came right under the window at which witness was standing and placed the bundle between himself and Smith; that they then sat down and ate their lunch; that he also saw four white men sitting down eating a lunch about forty feet away from where these negroes were eating. That after finishing their lunch Smith picked up the bundle and walked to the box out of which the bundle was taken and tore the paper off, laid the clothes over his arm, and defendant went to the end of the alley and motioned to Smith; that defendant then went across the street towards a saloon on the opposite side of the street, and Smith followed to the end of the alley and turned east along 12th street; at this time witness ran down stairs and tried to get out of the store to head them off, but Wandry had gone after a lunch and some beer for himself and witness, and had locked the door with a Yale lock and witness could not get out; that when Wandry came back they went in pursuit of the negroes; that they saw defendant and when they caught sight of him he went into a saloon and they followed him; that witness left appellant in charge of Wandry while he went in pursuit of the other negro, Smith, but failed to find him; that when he returned to where Wandry and defendant were, Wandry made the remark that defeindant would go and get the suit if they would let him go? "But I said I would not stand for this, but that if he would bring back all the suits it would be all right. Defendant denied knowing anything about any other suits." He says, "I saw them come in the alley and at that time they had no bundle except the small bundle containing their lunch. The next morning I searched the boxes and found a suit of Monnig's clothes, in the same box I saw them take the bundle out of." William Smith testified that he was a second-hand dealer about a block and a half from Monnig's store, and on Wednesday evening about 7:30 or 8 o'clock, Charley Smith came to his store with a suit of clothes,—a dark blue or black suit, and offered to sell it to him for $7.50; that he declined to buy, Smith went away and he saw no more of him or the clothes. City Detective Bell testified that after receiving a telephone call about 7:30 p. m. he went to where Wandry and Walker were holding defendant, put him under arrest, took him to the City Hall. The next day he arrested Charley Smith. The defendant testified that he had been living in Forth Worth ten or twelve years; that he had been working for Mr. Monnig the past six weeks; that he had never been arrested for burglary, or any other offense

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prior to this arrest and no charge had even been made against him; that he knew Smith and had known him six months; that he lived near him. He said, "He was not the negro who ate lunch with me as stated by Mr. Walker on the day I was arrested charged with this offense. On this day after I was through with my work I met a negro on the 12th street alongside of Durritt-Winter's store, this is just back of Monnig's, Monnig's fronting on Main street and Durritts fronting on Hudson street just west of Monnig's. At the time I met him he had a large bundle wrapped in brown paper in his arms, and he remarked that if we had a lunch and a bucket of beer we would be fixed. He furnished the money and I went around on Houston street and bought some fish and then went across 12th street to a saloon and borrowed a bucket and bought some beer and came back to where he was standing." This was the same place where defendant first met him; that they then went into the alley back of Monnig's store to eat the lunch and drink the beer; that this negro placed the bundle by his side while they ate. He says, "I did not take any clothes out of Monnig's store; I did not take any clothes out of the boxes back of the store. I did not take the bundle out of the box as stated by Walker, nor did this negro that was with me. He took the bundle with him when he went into the alley and took the same bundle with him to a trash box at the end of the alley, and after I passed him I saw him tear the paper off and throw it into the trash box, and then he threw the clothes across his arm and followed me out and went east on 12th street to Main, and the last I saw of him he turned the corner going south on Main street that would lead him right in front of Monnig's store. I told all this to Wandry and Walker when they held me in the saloon. Wandry wanted me to go and get this suit of clothes and I told him that if I knew where it was I would go and get it, but that I only knew this negro by sight and did not know his name nor where he lived. I did not tell anyone that if they would let me go I would go and get the clothes. I told them that if they would let me go I would go and try to find them for them. I denied knowing of any other clothes. * * * I did not know that Charley Smith was charged with the same offense until after I got out of jail on bond in this case." This is the case as made by this record. This evidence is not sufficient to justify this conviction. It is not shown that appellant had any of Monnig's clothes or that he ever took any of Monnig's clothes. The clothes that Walker mentioned that was taken away by Charley Smith was never identified as being the property of Monnig or anybody else,—not even shown to have been stolen.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

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JOHN MAXWELL V. STATE.

No. 2234. Decided January 29, 1913.

1.—Murder—Statement of Facts—Ninety Days.

Under no construction can it be held that the Legislature intended to grant more than ninety days in which to file a statement of facts in the trial court, and where such statements was filed one hundred and five days after the adjournment of the trial court, the same cannot be considered on appeal.

2.—Same—Misconduct of Jury—Statement of Facts.

In the absence of a statement of facts, the ground in the motion for new trial complaining of the misconduct of the jury could not be considered, especially, where same was filed after adjournment of court. Following Prcbest v. State, 60 Texas Crim. Rep., 608.

3.—Same—Argument of Counsel.

Where, upon appeal from a conviction of murder in the second degree, it appeared that the argument of State's counsel was made in response to that of appellant's counsel, and the court withdrew said remarks from the jury, there was no error.

4.—Same—Charge of Court—Practice on Appeal.

In the absence of a statement of facts, the rule is if the charge of the court is applicable to any state of facts, provable under the indictment, the presumption is that the court charged the law and all the law called for under the testimony.

Appeal from the District Court of Falls. Tried below before the Hon. Richard I. Munroe.

Appeal from a conviction of murder in the second degree; penalty, five years imprisonment in the penitentiary.

The opinion states the case.

Stephen L. Pinckney, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was prosecuted, charged with murder in the second degree.

The Assistant Attorney-General has moved to strike out the statement of facts. The term of court at which appellant was tried adjourned on the 23rd day of July, 1912, while the statement of facts was not filed with the district clerk until the 5th day of November, 1912,—105 days after the adjournment of court. The stenographers' Act of 1911 (Chap. 119, page 264, Session Acts) authorizes the court to extend the time for filing statement of facts and bills of exception, but provides that the same shall not be so extended as to delay the filing of the record in the Appellate Court within the time prescribed by law. The law and rules of the Supreme Court provide that the transcript must be filed in the Court of Civil Appeals within ninety days from adjournment. While in the code of Criminal Procedure there is no time fixed for filing the transcript in this court, yet, the Code provides that upon the adjournment of court the clerk shall

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immediately make out and forward the transcript to this court, and that transcripts in criminal cases shall be made out before the transcript in civil cases; so, under no construction can it be held that the Legislature intended to grant more than ninety days in which to file a statement of facts in the trial court, and the motion of the Assistant Attorney-General is sustained.

The statement of facts being stricken from the record there are several grounds in the motion for new trial it will be unnecessary to pass on, as we could not do so intelligently without the evidence being considered. Especially is this true of the grounds in the motion for new trial in regard to the misconduct of the jury. The evidence heard on these grounds, not being filed until one hundred five days after the adjournment of court, could in no event be considered. (Probest vs. The State, 60 Texas Crim. Rep., 608.)

There is a complaint in a bill of exceptions to the argument of the county attorney. In approving the bill the court states: "The defendant and Lillie Maxwell were separately indicted for the murder of Jim Baker. Lillie Maxwell was tried first and convicted. Then came on for trial the John Maxwell case and the defendant proved the conviction of Lillie Maxwell and introduced all of the evidence obtainable which in any way tended to show that Lillie Maxwell did the actual killing.

"In their argument to the jury counsel for the defendant contended that both Lillie Maxwell and defendant could not be guilty; that only the one who actually did the killing could be convicted; that by its verdict, the jury in the Lillie Maxwell case had found that Lillie Maxwell was the one that actually did the killing; that if the other jury had have thought that John Maxwell did the killing they would not have convicted Lillie Maxwell; that as Lillie had been convicted this jury ought to acquit this defendant.

"Replying to argument of counsel for defendant the county attorney called the attention of the jury to the law of principals in crime; that it was the theory of the State and the evidence showed beyond a reasonable doubt that defendant and Lillie Maxwell were acting together in the commission of the offense, and were principals, and that under the law of principals it did not matter which one did the actual killing. That the argument of counsel for the defendant to the effect that the conviction of Lillie Maxwell showed that Lillie actually did the killing, and therefore was the only one who could be convicted was not well founded and was a wrong conclusion to draw from that conviction, because the jury in that case was instructed by the court on the law of principals and therefore the verdict in that case does not conclusively show that the jury in that case found that Lillie actually did the killing, as they could have convicted in that case if they believed that John Maxwell did the killing, but that Lillie was acting with him under such circumstances as to make her a principal. Then the county attorney followed this argu-

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ment by saying that the jury in the Lillie Maxwell case had performed its duty, and now the county attorney was asking the jury to do its duty.

"The defendant objected to the remarks of the county attorney and requested the court to instruct the jury not to consider same, and the court instructed the jury, and the defendant made no further objection and did not further except. The county attorney explained to the court and jury that he was only replying to the argument of counsel for the defendant, and withdrew the remarks complained of and asked the jury not to consider same for any purpose." As thus qualified, the bill presents no error. If the remarks of the county attorney were but a legitimate reply to argument of counsel for defendant on an issue he injected into the case there is no ground for complaint, even if the court had not instructed the jury not to consider them. Especially is this true under such circumstances where the remarks are withdrawn and the court instructs them not to consider them.

The other complaints in the motion relate to the charge of the court and the refusal to give special charges requested. In the absence of a statement of facts the rule is if the charge as given is applicable to any state of facts provable under the indictment, the presumption will be indulged that the court charged the law and all the law called for under the testimony.

Judgment affirmed.

Affirmed.

O. F. GOULD V. STATE.

No. 2241. Decided January 29, 1913.

1.—Sunday Law—Transcript.

See opinion suggesting legislation with reference to filing transcript in the Appellate Court.

2.—Same—Indictment.

Where, upon trial of a violation of the Sunday Law, the indictment followed approved precedent, there was no error. Following Gould v. State, 66 Texas Crim. Rep., 122.

3.—Same—Practice on Appeal.

Where all the questions raised by bills of exception and motion for new trial were decided adversely to appellant in a companion case, they need not be again considered.

Appeal from the County Court of Dallas County at law. Tried below before the Hon. W. F. Whitehurst.

Appeal from a conviction of a violation of the Sunday Law; penalty, a fine of $100.

The opinion states the case.

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No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—This is a companion case to those reported in Gould v. State, 65 Texas Crim. Rep., 122, 146 S. W. Rep., 172 and 179, and 147 S. W. Rep., 247, and evidently was tried about the same time as those cases, this one being tried on May 19, 1911. The reason why the transcript was not filed in this court until November 11, 1912—eighteen months after the trial was had,—we do not understand. However, while the law requires that the transcript shall immediately be made out and forwarded to this court, it has been the rule of this court to consider the case regardless of the time in which it may be filed, as the law places the duty on the clerk of the courts to make and forward the transcript, and defendants can not be held responsible for their negligence. This case illustrates the need of some legislation in this regard, if a prompt disposition of the case is desired on appeal. In some instances coming under our notice more than two years elapse after the trial before the transcript is filed; consequently, the delay sometimes complained of is caused by matters which this court has no control of, and if it is desired to secure a more prompt disposition of cases on appeal the law must be changed and time fixed when the transcript must be filed in this court.

The same questions are raised as to the sufficiency of the indictment as were raised in the other cases. For the reasons there stated the court did not err in overruling the motion to quash. Gould v. The State, 66 Texas Crim. Rep., 122, 146 S. W., 172.

All the questions raised in the bills of exception and the motion for new trial in this case were so thoroughly discussed in Oliver v. State, 65 Texas Crim. Rep., 150, 144 S. W. Rep., 604, and the cases against this appellant hereinbefore cited, we merely refer to those cases, as the questions are identically the same. On the authority of those cases, the judgment is affirmed.

Affirmed.

JOHN DAVIS V. STATE.

No. 2050. Decided January 29, 1913.

1.—Vagrancy—Evidence—Other Offenses.

Where, upon trial of vagrancy, testimony of an attempt at bribery with which defendant was not shown to have had any connection or knowledge was inadmissible.

2.—Same—Evidence—Other Offenses.

Upon trial of vagrancy, it was error to admit testimony that the party, about whose place defendant was loitering, had no license to sell intoxicating liquors; there being no connection shown between the two offenses.

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Appeal from the County Court of Dallas County At Law. Tried below before the Hon. W. F. Whitehurst.

Appeal from a conviction of vagrancy; penalty, a fine of $25.

The opinion states the case.

Seay & Seay, for appellant.—On question of evidence of other offenses: Waterhouse v. State, 57 Texas Crim. Rep., 590, 124 S. W. Rep., 633; Owen v. State, 58 Texas Crim. Rep., 261, 125 S. W. Rep., 405; Skidmore v. State, 57 Texas Crim. Rep., 497, 123 S. W. Rep., 1129; Clark v. State, 57 Texas Crim. Rep., 181, 128 S. W. Rep., 131; Windham v. State, 57 Texas Crim. Rep., 366, 128 S. W. Rep., 1130; Pridemore v. State, 59 Texas Crim. Rep., 563, 129 S. W. Rep., 1112; Roquemore v. State, 59 Texas Crim. Rep., 568, 129 S. W. Rep., 1120; Maples v. State, 60 Texas Crim. Rep., 169, 131 S. W. Rep., 567.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, Judge.—Appellant was convicted of vagrancy and fined $25.

He was prosecuted under sub-division C of Article 634 of the Penal Code, charging that he was a person who had no visible and known means of a fair, honest and reputable livelihood and was able to work but did not work and had no property to support himself.

While the evidence was not very strong against him, if illegal and improper evidence had not been introduced against him, it might have been held sufficient to sustain the conviction. However, appellant introduced testimony that he did work, showing the work he did, with whom he worked and for whom he worked. In other words, it was a controverted issue. The testimony of the State was t the effect that he was repeatedly seen during the months of August, September, October and November 1911, at what is called Minter's Place, and that occasionally as an officer would pass this place from time to time they saw him sitting on a box, and that he would get out of the way and apparently or really leave and keep out of sight of the officer, after he was discovered. What Minter's Place is, the evidence with no certainty discloses. The officers show that he was arrested because he hung around Minter's Place.

The court then permitted the State to prove by two officers that during the early part of August 1911, Minter attempted to bribe two of them to permit gambling or gaming to go on in his place; that the officers reported that to the Police Commissioner, and he suggested that they go ahead and whenever the money was offered to take it and immediately arrest Minter for bribery; tha Minter did give them the money a few days later and that they arrested him and were prosecuting him for bribery. All this testimony was admitted over objections by appellant and he saved the question properly by bill of exception. It was not shown that appellant was present or

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had any knowledge or had any connection whatever with this attempted bribery, or bribery, of those officers by Minter. Under the circumstances the admission of this evidence against appellant over his objection was error.

Appellant also objected to the proof made by the State that Minter and another had no license to sell intoxicating liquors at the place called Minter's Place. Under the state of the proof in this case and the charge against appellant we can not see how such testimony was admissible against appellant. With the charge against appellant that was made and on which he was convicted and the state of the evidence as shown by this record, it was error to admit this testimony. Under some character of charge against appellant for vagrancy it might be admissible to make such proof, but not under the charge against appellant in this case.

For the errors in admitting the testimony above stated, the judgment is reversed and the cause remanded.

Reversed and remanded.

Ex Parte Douglas Copley.

No. 2328. Decided January 29, 1913.

Habeas Corpus—Jurisdiction.

The relator in an application for habeas corpus cannot appeal from an order refusing to issue the writ of habeas corpus. Following Ex parte Blankenship, 5 Texas Crim. App., 218, 57 S. W. Rep. 646, and other cases.

Appeal from the Criminal District Court of Dallas. Tried below before the Hon. Robt. B. Seay.

Appeal from an order refusing to issue the writ of habeas corpus.

The opinion states the case.

J. S. Baker and *G. A. Harmon,* for relator.—On question of right of appeal: Laturner v. State, 9 Texas, 451; Art. 5, Sec. 16, Constitution of Texas; Art. 894, Code Crim. Proc.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, Judge.—Appellant was tried in the County Court of Dallas County, sitting as a juvenile court, and the judgment of the court was that he should be sent to the reform school at Gatesville for four years. We gather these facts from the petition of the relator, presented to Honorable R. B. Seay, Judge of the District Court of Dallas County, praying for a writ of habeas corpus. Judge Seay refused to issue the writ of habeas corpus, and from this refusal appellant gave notice of appeal to this court.

The first question to be decided is, has this court any jurisdiction on appeal, where the District Court refuses to issue the writ? This may

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furnish ground to apply to this court for an original writ of habeas corpus, but no such application has been filed.

This question was fully discussed and decided in Ex Parte Ainsworth, 27 Texas, 732, and it was there held that a person could not appeal from an order refusing to issue the writ of habeas corpus, but the applicant's remedy was to apply to another court for an original writ. For a full discussion of this question we refer to that opinion. See also Ex Parte Blankenship, 5 Tex. Crim. App., 218; 57 S. W. Rep., 646; Ex parte Foster, 5 Texas Crim. App., 625; Ex parte Strong, 34 Texas Crim. Rep., 309.

Appeal dismissed.

Dismissed.

JOE PARISH V. STATE.

No. 2203. Decided January 29, 1913.

1.—Aggravated Assault—Evidence—Contradicting Witness—Malice.

Where, upon trial of aggravated assault, the party alleged to have been injured testified that he and the defendant had always been friends and that he did not put any dough containing poison in front of defendant's house and did not poison defendant's chickens therewith, the court should have permitted defendant to show the alleged injured party did all these things, to show the malice of the State's witness.

2.—Same—Evidence—Credibility of Witness.

Where, upon trial of aggravated assault, the party alleged to have been injured testified that he had not been able to work, etc., and to be out and about for some time after the injury, the court should have permitted the defendant to show that the said party, the day after the difficulty, was around defendant's place armed with a gun, cursing and abusing defendant and daring him to come out and settle the difficulty.

3.—Same—Charge of Court—Force—Self-defense.

Where, upon trial of aggravated assault, the evidence showed that the defendant was acting in self-defense, a charge of the court curtailing the defendant's right of self-defense to the issue of more force than was necessary, etc., was reversible error; the defendant having requested proper charges on this issue of the case.

4.—Same—Charge of Court—Weight of Evidence—Self-defense.

Where, upon trial of aggravated assault, the evidence raised the issue of self-defense, a charge of the court eliminating such defense was reversible error.

5.—Same—Serious Bodily Injury—Insufficiency of the Evidence.

Where serious bodily injury was alleged as a cause of aggravation in a trial for aggravated assault, and the evidence did not show any such serious bodily injury inflicted upon the party alleged to have been injured, the conviction can not be sustained.

Appeal from the County Court of Harrison. Tried below before the Hon. Geo. L. Huffman.

Appeal from a conviction of aggravated assault; penalty, a fine of $100 and six months confinement in the county jail.

The opinion states the case.

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Y. D. Harrison, for appellant.—On question of the court's charge on force: Marsden v. State, 54 Tex. Crim. Rep., 70; 110 S. W. Rep., 897; Gray v. State, 55 Tex. Crim. Rep., 90; 114 S. W. Rep., 635.

On question of serious bodily injury: Wilson v. State, 15 Texas Crim. App., 150; Skidmore v. State, 43 Texas, 93; Halsell v. State, 29 Texas Crim. App., 22; Pinson v. State, 23 Texas, 579.

On question of showing malice of State's witness: Clark v. State, 28 Texas Crim. App., 189; Hunt v. State, 9 id, 166; Meyers v. State, 37 Texas Crim. Rep., 208; Taylor v. State, 56 S. W. Rep., 753.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was convicted of aggravated assault and battery, his punishment being assessed at a fine of $100 and imprisonment in the county jail for six months.

As usual, in cases of this sort, the evidence is in conflict and presents divergent views to be considered by the jury under appropriate instructions of the court. The witness and alleged assaulted party, Greer, testified that he and appellant live about a mile apart and about five miles from the city of Marshall. That their farms joined, and that he owned some land directly in front of appellant's house. That on the morning of July 24, 1912, in company with his boy he went to his corn field, which was near appellant's house and across the road; they cut an arm full of corn each and started down the road in the direction of his home and met appellant. He says, "Appellant did not speak to me, but as I thought passed by." "Just after he had passed he struck him with something on the shoulder which knocked me down and rendered me unconscious." He says when he came to himself appellant was whipping him with a leather strap with a buckle on the end of it. He had torn his shirt off all but the right arm and had almost torn his breeches off. Greer says he staggered up and put his hand in his right pocket and got his knife and went to pull his trousers up and appellant slapped the knife out of his hand and shoved him over on the ground. That he continued whipping him with the leather strap until Texana Davenport and others told him he had whipped him enough and he let him go. Greer says he then got up and went down the dirt road to the railroad crossing, then took down the railroad towards home. When he came to the trestle on the railroad the morning passenger train was approaching; he ran down the dump under the trestle to hide from the passengers; that he did not desire them to see him in his condition. He further says: "I have not been able to do any work since the time this happened and am still not able to do any work." At this point he was asked to stand up before on his person, and the district attorney called attention to the wounds the jury and take off his shirt so that the jury could see the wounds and bruises on his back from his shoulders to his hips and then changed his face to the jury and pointed to his collar bone, showing a

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lump where the witness said his collar bone was broken. To all of this appellant interposed objections on various grounds. On cross-examination he says that when he became conscious of surrounding circumstances he saw Lon Parish, Texana Davenport, Lucy Franklin, B. F. Turner and others present. He says he did not go a day or two before this in front of the defendant's house and scatter some material in the road and in the fence corners, and did not put anything there that had poison in it that would poison the defendant's chickens. He says that he and appellant had lived about a mile from each other, and had so lived for ten or fifteen years, and were perfectly friendly. He says, "I never have had any trouble with Joe before." He further states, "After I came to myself and after I tried to get my knife out I fought back at Joe as best I could and I don't know how long we were there fighting; it might have been twenty-five or thirty minutes. Finally Texana Davenport and Lon Parish told Joe to be ashamed of himself and go on home and let me alone, and told me to go on home and let Joe alone."

Dr. Rains testified for the State that he treated witness Greer for the wounds supposed to have been inflicted by appellant. He states that Greer's back had been lacerated considerably by some instrument and there were numerous abrasions of the skin on the back, some of which were oozing. His collarbone was broken. Quoting witness, he says: "I don't think his collarbone was broken by a blow at that point, because there was no bruise of the flesh or broken skin to show that there had been any blow." He considered the wounds serious because infection might result from the wounds. On cross-examination he says the collarbone was broken, but he was confident there was no bruises on the body at the point where the bone was broken. It could have been done from a fall or catching with his hands. The wounds on the back were not of a serious nature and such as would likely produce death or serious bodily injury. The wounds on the collarbone were not such that would likely produce death—just a broken collarbone without any bruise on the person at the point where the break was. Any wound, however slight, could start infection of the person. This is the State's case.

Appellant introduced a number of witnesses, who testified to the general reputation of the assaulted party Greer for truth and veracity as well as the general bad reputation for peace and violence in the neighborhood in which he lived, all showing that it was bad in both respects. Nancy Parish testified she was the wife of defendant and saw the difficulty between her husband and Greer and was present on that occasion. She says on the morning of the difficulty she, her husband and Lucy Franklin had gone down to the peach orchard of Geo. Davenport to gather peaches and were in the peach orchard at work when Greer came along the road with a turn of corn on his shoulder. The orchard was near the side of the road and appellant, when he saw Greer coming, went to the fence and just as he crawled under the

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wire to get in the road he asked Greer why he had poisoned his chickens and says to him, "Have I done you any harm, or have my chickens been bothering you?" When appellant said this Greer threw his corn down, jerked out his knife and cursed appellant, and he said he killed his chickens and damn him he would kill him, and started at appellant with his knife open. When this happened appellant struck him on the arm with his hand and knocked the knife out of his hand, and Greer jumped towards the knife and stooped over to pick it up, and as he did this appellant shoved him down and he fell beyond the knife and appellant picked the knife up. Greer jumped up and they went to fighting. Appellant would push him off with one hand and whip him with the leather strop with the other, and this continued until Texana Davenport came and parted them. She says that appellant never struck Greer with anything except his fist and the leather strop; that he had no club or stick in his hand. When Texana Davenport got there she told them to quit, that they ought to be ashamed of themselves, and they quit fighting. Appellant went off towards his home and Greer went off down the dirt road towards the crossing. She says a day or two before the difficulty she saw Greer in front of her and appellant's residence with a bucket in his hand dropping something in the road and in the fence corners, and the next morning when she got up she found about forty of her chickens dead; they were scattered all over the place; some of Texana Davenport's turkeys also died as well as several of her chickens. She says she then went around and looked at the material Greer had dropped and saw that chickens had been eating it and scratched around it, and she picked up some of this material and carried it to the house and turned it over to appellant, her husband.

Texana Davenport testified she lives about two hundred yards of appellant. That on the morning of the difficulty she heard some loud talking and looked out of her door and saw appellant and Greer scuffling; she first thought they were just tusseling with each other, but soon discovered they were fighting, and she immediately ran to where they were. On reaching them Greer was knocking appellant with his fist and hands and appellant was knocking Greer with one hand and whipping him with a leather strop with the other. "From the time I first saw them up to the time they quit, this leather strop was all that Joe Parish used on him. I never saw him hit him with a stick or anything. When I got there they had virtually torn everything off of them and had on nothing but their pants. I told them they ought to be ashamed of themselves and to quit fighting and go home and when I said this they quit. Greer went up the road home and Joe went on home." This was all she "saw at the row." She says a day or two before this several of her chickens and eight or ten of her young turkeys died; that her chickens and turkeys died the same night that Nancy Parish's chickens died. On cross-examination she stated when she got down to where Greer and appellant were fighting they were

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both standing up fighting each other. Appellant was using a leather strop on Greer which he had fastened on his arm with a string. "I told them they ought to be ashamed of themselves." She says she heard appellant say to Greer just as she reached them, "You must live a good man around here. I am just tickling you now; the next time I will whip you."

The defendant testified in his own behalf that a day or two prior to the difficulty he saw Greer in front of his house in the road with a bucket in his hand scattering some material that looked like dough. "I didn't pay any attention to that until the next day in the afternoon. Early the next morning I came to town and when I got back home my wife had forty of her chickens piled up in the yard dead and I saw some young turkeys and some of Geo. Davenport's chickens dead. I went out in the road where this stuff was and saw that the chickens had been picking in it and scratching around it and picked some of it up and brought it to town and yesterday turned it over to Mr. Matthewson and asked him to analyze it to see if it had poison in it and he promised he would do it. The day of the difficulty my wife and I and some other darkies went to George Davenport's peach orchard, which is about half way between where I live and where George lives and right on the side of the road. We were there gathering peaches and I saw Jim Greer coming along the road with a turn of green corn on his shoulder. I walked out to the road and asked him why he had poisoned my chickens and also if I had done him any harm and if the chickens were bothering him. He threw his corn down and jerked this knife (which he exhibited) and began cursing me and making towards me with the knife open and said that he killed my chickens and dam me he would kill me if I fooled with him, and made at me with a drawn knife and I slapped his arm that had the knife in it and knocked it out of his hand. The knife fell off a piece from him on the ground and he stooped to pick it up, and as he did that I shoved him over the knife and grabbed it and shut it up and put it in my pocket, and that is the way I got the knife. (Witness here produces the knife.) Greer jumped up and made at me and we went to fighting. I would push him off of me with one hand and whip him with this leather strop with the other ,and we fought there until Texana Davenport parted us. I went to the road and asked Greer this question with no intention of raising a row with him, but solely to find out if he poisoned my chickens and if they were bothering him. I had no idea of having a difficulty with him when I spoke to him. I did not meet him in the road and pass him without speaking to him as he said I did. I crawled under the wire fence coming from the peach orchard and as soon as I got out on the outside of the fence I said, 'Good morning, Mr. Greer,' and then I asked him about poisoning my chickens. I knocked the knife out of his hand to keep him from cutting me. He was making at me with it open and I thought he intended to kill me. All I ever did to him was to push him off with one hand and whip

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him with this leather strop with the other. I didn't hit him on the shoulder with a club or stick as he said I did. I never thought of getting a club or a stick nor ever thought of having a row with him until he started at me with a knife. We have never had any trouble before this." Appellant accounted for having the leather strop by saying he found it on his way to the peach orchard and picked it up and carried it along with him.

A Mr. Sanders testified that the knife introduced in evidence had a blade about two and one-half inches long and a handle about three inches long. It was an instrument with which one man could kill another and might be a dangerous weapon. The strop introduced in evidence was leather and about two and one-half feet long and two inches wide and something like an eighth of an inch thick. This is substantially the evidence introduced on the trial.

The first bill of exceptions recites that while appellant was on the stand testifying in his own behalf, he stated that a few days prior to the difficulty he saw Greer out in the road in front of his house with a bucket in his hand dropping something in the road and in the fence corners; that the next morning after this was done he noticed his chickens and found forty dead. That not only had his chickens died, but his neighbors' chickens had also died. That he went out in the road and fence corners and saw some material which resembled dough lying on the ground and noticed that the chickens had been eating and scratching around in it. He was then asked if he knew what caused his chickens to die and what, if anything, was mixed up in the dough. Witness would have answered, had he been permitted to do so, that they died from eating the material that the witness Greer placed in front of his house and that said material contained poison that killed the chickens, but the kind of poison he was unable to state. The State objected to this on various grounds, which we deem unnecessary to state, and the court sustained the objections. Appellant offered this testimony to show malice of the witness Greer toward defendant and to contradict the witness' statement on the stand wherein he testified that he and the defendant had always been friends, and that he did not put any dough containing poison in front of the defendant's house and did not poison his chickens at the time referred to in this bill of exceptions. For the purpose for which this testimony was offered, it should have been permitted to go to the jury. It is unnecessary to elaborate the reasons why this is so. The witness Greer having testified that his feelings had always been friendly towards appellant and their relations had always been friendly, and that he had no ill-feeling, etc., towards him, this testimony, we think, should have been permitted to go to the jury.

The second bill of exceptions recites that the same testimony was offered through the witness Nancy Parish, wife of appellant, and rejected. The objections of the State, and the purpose for which offered by defendant, are the same as in the previous bill.

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Another bill, after reciting the matters and things with reference to Greer going in the road and fence corners and scattering dough and material about appellant's house from which his chickens died, shows that appellant offered to prove by witnesses that the day after the difficulty they saw Greer, his wife and son in front of appellant's place in the road near the gate, Greer being armed with a gun, and he cursed and abused defendant, and called him to come out of his house and let them settle it; told the defendant that he was afraid to come, and while the witness Greer was standing in front of his gate, cursing and abusing defendant, Greer's son went into the stable of the defendant and deposited some material in both of his mule troughs just like the witness Greer had deposited in the road, which defendant's chickens ate and which killed the chickens, and this material contained poison and it was put in the troughs for the purpose of poisoning the defendant's mules. This was excluded on objection of the State. The same matters were set forth in another bill of exceptions by the witness Nancy Parish. This was offered for several purposes, one of which was to contradict Greer to the effect that he was unable to get about, was confined about the house, and unable to work, etc., for some time, and even up to the time he testified in the case. We think this testimony was admissible, if Greer had gone to the house of appellant as the witnesses state the day following the difficulty alleged in the information, to meet and contradict Greer that he was not able to be about. This would show that he was able to get out, and that he was armed and carried his gun, and went to appellant's house for the purpose of settling the difficulty with guns with appellant.

There are various objections to the charge given by the court and refusal of charges asked by appellant submitting the different theories of the case. It is hardly necessary to take them up seriatim, as we think they can be disposed of in a general way. The court charged the jury as follows:

"In this case defendant has introduced evidence tending to show self-defense. You are instructed that every person is permitted by law to defend himself against any act of unlawful violence offered to his person, but in exercising this right of self-defense he is only permitted to use such degree of violence as is reasonably necessary to prevent or protect himself against such unlawful violence.

"Now if you believe from the evidence that the defendant, in inflicting the injury upon the said Jim Greer as charged in the information, acted in his own necessary self-defense, against an assault made by said Jim Greer upon him, or to prevent such assault, and that he did not use greater force than was necessary to prevent such assault, then you will find defendant not guilty."

This charge was not the law of this case, and was clearly erroneous. The question has been frequently decided by this court, that charges

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of this character in cases of this sort are clearly erroneous. In the case of Marsden v. State, 53 Texas Crim. Rep., 458, this charge was expressly condemned and the judgment reversed alone for its being given the jury. Appellant requested instructions submitting the law of self-defense, which were refused by the court. All these matters are properly presented for adjudication. It may be necessary to set out two of the charges asked by appellant:

"Now if you believe from the evidence, on or about the 24th day of July, 1912, the defendant Joe Parish, believing that the said Jim Greer had poisoned his chickens, and in order to find out who poisoned said chickens, asked the witness Jim Greer if he poisoned his (Parish's) chickens, with no intent on the part of him, the said Joe Parish, to raise a difficulty with him, the witness Greer, and the witness Greer upon being asked the question, started at the defendant (Parish) with his knife and the defendant believed from the words of the witness Greer, coupled with his acts or either of them, that the witness Greer intended to make an assault with his fist or with the knife upon the person of the defendant, then the defendant had the right to defend himself against the witness Jim Greer from hitting him, the defendant, or cutting him with his knife."

He also asked this charge: "The defendant in this case has a right to do anything necessary to protect his property or person from being injured by Jim Greer or any other person, and if you believe beyond a reasonable doubt from the evidence in this case that the witness Greer made an assault or attempted to assault the defendant either with his person or his knife, and the defendant believed from the statements in evidence before you that the said Greer was about to assault him with his knife and his person, or either of them, then the defendant Joe Parish had a right to defend himself against any attack made by the said Greer, and if you believe from the evidence the witness Greer made an attack upon the defendant and the defendant repelled that attack, you will acquit the defendant."

This was also refused. These are mentioned in order to show that the court erred in giving the charge he did in limiting appellant's right of self-defense to the issue of more force than was necessary and curtailing his right of self-defense and the action on the part of appellant seeking to correct that and have the law properly presented covering his side of the case. Appellant had the right to approach and ask Greer if he had poisoned his chickens and why, and if this was done with no purpose of bringing on a difficulty, his right of self-defense would be perfect. This question was thoroughly adjudicated in Shannon v. State, 35 Texas Crim. Rep., 2, which case has been followed undeviatingly to date. It is also the law that if Greer made the attack or attempted to make it with a knife, appellant certainly had the right to protect himself without being burdened with the doctrine of unnecessary force. If unnecessary force enters into a case,

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the law applicable thereto may be given in charge to the jury, but where the right of self-defense comes as in this case then such charge on unnecessary force is not requisite or permissible.

The court gave another charge, to which objections are urged, as follows: "I instruct you that you may consider the testimony of the witnesses, Nancy Parish, Texana Davenport and Joe Parish, with reference to the substance being deposited in the road and upon the premises of Joe Parish and the loss of chickens by defendant, for no purpose other than as mitigation of punishment in the event you find defendant guilty." It is little difficult to perceive upon what theory this charge was given or why such limitation should be placed upon the evidence. This evidence was the central point of the case; it was the occasion for the entire difficulty. Under this charge the jury was instructed in effect that appellant approached Greer and whipped him because he had poisoned his chickens. This was an assumption on the part of the court, so far as this charge is concerned, that appellant was the aggressive party and whipped Greer because of that fact. The issues in the case were strongly and sharply contested by the evidence that Greer was the attacking party and not appellant. By this charge all idea of self-defense on the part of the defendant was clearly eliminated. Other reasons might be given why this charge is not the law of this case, and it was clearly a charge on the weight of the evidence, but we have said enough without going further into detail.

The complaint and information charge appellant, as grounds of committing the aggravated assault, with inflicting serious bodily injury. Without reviewing the testimony, it is sufficient to state that the doctors who examined Greer testified that the injuries were not of a serious nature otherwise than they might be subject to infection and his testimony shows that the collarbone was not broken by means of the strap, for there was no bruise at that point. In fact, there is no testimony, as we understand this record, which would show the collarbone was broken by the use of the strap. How it was broken is not shown, and it may be questioned whether it was broken in the difficulty at all. But be that as it may, if the doctor's testimony is to be the criterion, the State has not made out a case of serious bodily injury. There were bruises on the body of Greer inflicted by the leather strap, but the prosecution did not charge appellant with an aggravated assault by the use or means of an instrument that would inflict disgrace; it was charged and relied only and solely that serious bodily injury was inflicted. We are of opinion, under the numerous authorities, this evidence does not show serious bodily injury.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

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PIG OLIVER V. STATE.

No. 2231. Decided January 29, 1913.

Burglary—Insufficiency of the Evidence.

Where, upon trial of burglary of a railway car, the evidence was insufficient to sustain a conviction, the judgment is reversed and the cause remanded.

Appeal from the District Court of Upshur. Tried below before R. W. Simpson.

Appeal from a conviction of burglary of a railway car; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Warren & Briggs, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was charged with having broken and entered a box car, then and there owned by H. A. Williams, the agent of the St. Louis Southwestern Railway Company of Texas, etc.

Several questions are suggested for revision. It is shown with reasonable certainty that a car was broken into and some whisky, marked or labeled "Kentucky Tavern," was taken from the car. The car contained at least a package of that character of whisky and in checking up the contents of the car said box was not found. The witness Howell said he was deputy sheriff; that he undertook to ascertain who broke into the car; that he saw appellant some two or three months after the alleged burglary drinking out of a half-pint bottle of whisky in the Kelley warehouse; that he had two negroes under suspicion, Jim Hanson and Pig Oliver; that he saw defendant go over there several times and watched him through a hole up near the ceiling and saw him drink out of a half-pint bottle. Witness went in and got a bottle from under the floor; that he felt around at different places and got a half-pint of whisky which was branded "Kentucky Tavern" and it was the bottle out of which he saw appellant take a drink; that he got a "lot of wrappers" branded "Kentucky Tavern,"—some were coverings to half-pints and some to pints; that he also found a bottle of catchup and a bottle of pepper sauce which defendant admitted he placed there. Appellant was a porter working in the store for Mr. Kelley and drove a delivery hack; that his business was to make deliveries and he had to go into this house to get feed and grain and had a key to the warehouse. He is a negro that drinks a great deal. All the witnesses give the negro a good character for honesty. Hanson, the other negro whom as officer he had under suspicion, was and is a fugitive from justice, and the witness did not know where he was, but had been looking for him and failed to catch him. R. C.

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Dial, for the State, testified that he was a clerk for Kelley in the grocery store and remembers the time the box car was broken into; that appellant was delivery boy and porter in the store; that appellant had a key to the warehouse which was in the old Sheppard & Kelley building; that the door stood open most of the time before they put a lattice door there, which was some time in May just a little while before appellant was arrested. This witness gave appellant a good character for honesty and said he had never heard of his having been accused of stealing; appellant had a key to the lattice door and went into the warehouse, but witness had seen it standing open when he would be gone to make a trip; the warehouse was close to the depot. Conright testified that he was porter at the depot; knew Jim Hanson; that he was gone; that they had some kind of charge against him and he run away. He says, "I was working the night somebody broke in the car. I don't know who broke in the car." And didn't recollect seeing appellant around the depot that night; that he had at times seen appellant around the depot, but it is a place where everybody gathers, being the only place there is any light in town after the stores close. Defendant testified in his own behalf that he was drinking some whisky in the warehouse when Mr. Howell arrested him; that he did not put the whisky there and knew nothing of it, except what Jim Hanson told him. He says, "He said he put it there and told me where it was and I could drink some of it when I wanted to. I have taken several drinks there with Jim Hanson." He says, "I got the bottle of pepper sauce and bottle of ketchup and put them there and intended to take them home and was going to tell Mr. Kelley about it when he come home." Kelley at the time was at Hot Springs, in Arkansas. He says, "I did not tell Mr. Howell Jim Hanson put the whisky there. He did not ask me." He denied breaking into the car and said he knew nothing on earth about it. This is about the substance of the case. Summed up in its final analysis, the testimony shows that the car was broken into about the 15th of March; appellant was seen by the deputy sheriff, looking through a knot hole, to drink some whisky out of a half-pint bottle, went to the place where he saw appellant take the drink and found a bottle of whisky labeled "Kentucky Tavern." This was two months or longer after the alleged burglary. It is shown that the car contained a case or box or something of the sort of whisky supposed to be "Kentucky Tavern." This is not sufficient evidence on which to base this conviction. Appellant says that Jim Hanson showed him where the whisky was and invited and authorized him to drink it. This is not controverted. This whisky was not identified as the whisky that came out of the car.

The judgment is reversed and the cause remanded.

Reversed and remanded.

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TOM JONES V. STATE.

No. 2049. Decided January 22, 1913.

Rape by Force—Insufficiency of the Evidence.

Where the testimony of the prosecutrix rendered it improbable, if not impossible that the offense of rape by force was committed upon her, and defendant's testimony showed an alibi and good reputation, the conviction was not sustained. Prendergast, Judge, dissenting.

Appeal from the District Court of Panola. Tried below before the Hon. W. C. Buford.

Appeal from a conviction of rape by force; penalty, five years imprisonment in the penitentiary.

The opinion states the case.

J. H. Long and *T. P. Long,* for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—This conviction was for rape by force, appellant receiving a term of five years confinement in the penitentiary.

The only question presented for revision is the sufficiency of the evidence to justify the verdict. The prosecutrix, Lemmie Allison, was shown by the evidence to be over sixteen years of age. On the 21st day of October, 1911, appellant came to the home of her father. When she first discovered him he was "standing on the door block." She turned and "looked at him and he asked me to give him some. I told him I wasn't studdying him. He then came on in the kitchen where I was and caught hold of me, one hand at my throat and the other around me. My sickness was on me at this time. He threw me down and when he hurt me I bit and began scratching him, and he then got up and I grabbed a board and hit him with it and he ran away. I then went down into the cotton patch where my mother and father and Wm. Powell were and told them Tom Jones had been up there where I was. It was about 11 o'clock on Friday, October 21, 1911. He went about half way in. He got on top of me and he put his thing in mine. I tried to hollow, but I could not, for he was choking me. Just as soon as I got aloose from him and had run him off, I went to the field and told my mother. My mother examined my privates as soon as we got back to the house. I did everything I could to keep him from raping me, and I did not consent to his having intercourse with me. I have known Tom Jones some time; he used to go with me. When he told me to give him some I told him I wasn't studdying him. I did not hollow or make any outcry when he came on into the room. I just kept on telling him I wasn't studdying him. He grabbed me then and threw me on the floor. His left hand was around me but

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don't know where his right one was. He got my drawers off but never got my dress above my knees. He did not get my legs apart but they were right close together all the time. When he got on top of me he hurt me. Don't know what he hurt me with, but when he hurt me I bit him and he got up and I grabbed a board and hit him side the head and he ran off. He got off of me just as soon as I bit him, and I bit him just as soon as he got on top of me. I know he went into me half way because my mama examined me and she told me so, and she also told me to swear that he went into me half way. I never did hollow or cry out, because I could not; he was choking me."

The mother of the prosecutrix testified that she was in the cotton patch picking with her husband, Dave Allison, Wm. Powell and some children; they were about 300 yards from the house. "There was no obstruction between us and the house and could see the house from where we were picking cotton. My daughter was at the house cooking dinner. About 11 o'clock she came down to where we were picking cotton and was crying. Her clothes were torn nearly off of her and she was bloody all over in front. She told me Tommie Jones had been up there. I went on to the house and examined her and knew Tommie Jones had been there. My daughter's sickness was on her and had been before she was raped."

Dave Allison, the father of prosecutrix, testified in regard to the fact that he and Powell and his wife and some children were picking cotton about 300 yards from the house when his daughter came down there crying about 11 o'clock. She told them that Tom Jones had been up there. This witness did not ask his daughter any question about it, but left for the house. He says he did not talk to her about the matter. He says, "We were in sight of the house picking cotton and could have heard any one hallo. I didn't hear any disturbance up there at the house. I did not stop my girl from school last year to nurse the baby, but because she was being scandalized. I stopped her before this business came up." He denied having a conversation with Mr. Carmichael, a white man and merchant at Clayton, about two weeks before the grand jury met which indicted appellant for this offense, in which "I told him I wanted this business to stop; that I didn't want it to go any further because I didn't believe my daughter had been raped. Tom Jones used to go with my daughter and I thought a lots of him then; don't like him now; would like to see him go to the penitentiary." This witness was contradicted by Mr. Carmichael, the white man above mentioned, in accordance with the predicate laid. This was the State's case.

Appellant introduced Seymore Roquemore, who says he saw the defendant on the day indicated about 12 o'clock going from his father's field in the direction of Mr. Cariker's store; he was in the public road walking; saw him going down the road and saw him go by and beyond the house indicated by prosecutrix. The witness says, I know he did not stop there. I came on behind him and saw him go

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on a mile on the other side of Dave Allison's house going in the direction of Cariker's store."

A white man by the name of Long testified he was mail carrier from Clayton, near where the offense occurred, on the day indicated, and left Clayton at 12:10 p. m. and met defendant coming from Cariker's store. It was then about 12:30. He had a conversation with defendant about getting witness some wood. Defendant had a bottle of snuff in his hands and said he was going home. Appellant proved by several witnesses a good reputation as a law-abiding negro boy, and that the prosecutrix's reputation for chastity was bad. On cross-examination by the State he stated, among other things, he heard the negro school teacher and other negroes living around there talking about prosecutrix. The negro school teacher was named Wallace. Nelson, a white man, testified to the good reputation of defendant. Another Nelson, the justice of the peace at Clayton precinct, testified also as to the general good reputation of appellant, and the general bad reputation for chastity of the prosecutrix. Carmichael, another white man, contradicted Dave Allison on the matters indicated in the predicate heretofore mentioned. Wallace, the negro school teacher, testified that such was his occupation, and that the prosecutrix had gone to school to him the first part of the year 1911. He says her reputation was bad for chastity. Laura Jones, mother of defendant, testified that on the day the offense is said to have been committed she was in her husband's field picking cotton; defendant and her other children were with her; they picked cotton until 12 o'clock and then went to the house. That defendant went on to the house with her. That they knew it was 12 o'clock for they always worked until they heard the whistles blowing for 12. On reaching the house she sent defendant to Cariker's store to get a bottle of snuff, and he left the house about 12 o'clock to go after the snuff. That defendant was in the field all the morning picking cotton with her. Powell was called in rebuttal by the State, and placed himself in the field with Dave Allison and the others where they were picking cotton at the time prosecutrix came into the field where they were. He said this was about 11 o'clock. When she came he looked up and saw she was crying; they were picking cotton about 300 yards from the house where prosecutrix was; that they could see the house and could have heard any one hallo or make any disturbance; that he did not hear any disturbance up there. When prosecutrix told her mother that appellant had been there "I asked her if she was telling the truth. The reason I asked her that was because I didn't believe that she was telling the truth, but thought she was trying to work some trick. I knew Lemmie well and didn't believe what she said. Her clothes were not torn and there was just a little blood on her waist." He contradicted Dave Allison as to the time Dave Allison states he left the place where they were picking and went to the house. Bryant testified in rebuttal for the State that he was deputy sheriff of Panola County and lived at Clayton, and

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knew all the parties. That he had occasion to go to Dave Allison's house on Saturday after the alleged rape was committed. "I made a close examination of Lemmie Allison from the waist up, examining her. I found no scratches or bruises on her body at all. Her sickness was on her," etc.

We are of opinion the evidence is not sufficient if the testimony of the prosecutrix is taken, as she states it, to be true. She says his left hand was around her but she did not know where his right hand was. "He got my drawers off but never got my dress above my knees. He did not get my legs apart but they were right close together all the time. * * * I know he went into me half way because my mama examined me and she told me so, and she also told me to swear that he went into me half way." It would be a very remarkable case of rape to be committed under the statement of this girl. How he could have committed rape with the girl's dress never above her knees and her legs not apart and kept closed all the time, would be a very peculiar rape, and especially in view of the fact she says her mother told her that he entered her half way up, and instructed her to so state. This character of testimony in the consummation of rape does not comport with human experience nor with the truth. Under our authorities we do not believe this evidence justifies the conviction. Dusek v. State, 48 Texas Crim. Rep., 519; Gazley v. State, 17 Texas Crim. App., 278; Montresser v. State, 19 Texas Crim. App., 281; Kee v. State, 65 S. W. Rep., 517; Adkins v. State, 65 S. W. Rep., 925; Donahue v. State, 79 S. W. Rep., 709. These are sufficient authorities upon this proposition.

Believing the evidence does not warrant a conviction of rape, the judgment is reversed and the cause is remanded.

Reversed and remanded.

PRENDERGAST, JUDGE (dissenting).—I do not agree to the reversal of this case on account of the claimed insufficiency of the evidence. I think the evidence was sufficient. The credibility of the witnesses and the weight of their evidence was a question for the jury.

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FEBRUARY, 1913.

SAM LUCAS v. STATE.

No. 2183. Decided February 5, 1913.

Rehearing denied April 16, 1913.

1.—Murder—Continuance—Want of Diligence.

Where the court overruled the application for continuance which clearly showed a lack of diligence, there was no error.

2.—Same—Indictment—Precedent.

Where, upon trial of murder, the indictment followed approved precedent, there was no error in overruling a motion to quash.

3.—Same—Sufficiency of the Evidence—Pleading—Proof.

Where, upon trial of murder, the evidence supported the conviction of that count in the indictment which charged the defendant with killing deceased by beating and bruising her with a weapon the name, character and description of which was to the grand jury unknown, there was no error on this ground.

4.—Same—Charge of Court—Voluntary Use of Intoxicating Liquors.

Upon trial of murder, where there was no evidence that defendant claimed that he was insane from the recent voluntary use of intoxicating liquors, there was no error in the court's failure to charge upon art. 41, Penal Code; besides, the complaint in the motion for new trial on this ground was entirely too general, and no special charge having been requested and no bill of exceptions reserved at the proper time. Following Byrd v. State, 151 S. W. Rep., 1068. Ex parte Evers, 29 Texas Crim. App., 539, and other cases.

5.—Same—Use of Intoxicating Liquors—Intoxication no Defense.

The mere fact of intoxication at the time of the homicide will not affect the crime nor the degree of murder. Following Clore v. State, 26 Texas Crim. App., 624, and other cases.

6.—Same—Misconduct of Jury—Statement of Facts.

Where the statement of facts, on the motion for new trial attacking the verdict of the jury for misconduct of the jury, was filed after the adjournment of the trial court, the same could not be considered on appeal; besides, the record showed that there was no such misconduct. Following Knight v. State, 64 Texas Crim. Rep., 541, 144 S. W. Rep., 967 and other cases.

7.—Same—Corpus Delicti—Sufficiency of the Evidence.

Where, upon trial of murder, the evidence showed that the deceased was killed by violence to her person and that the defendant and no other killed her, the corpus delicti was established and the conviction of murder in the second degree sustained.

Appeal from the District Court of Tarrant. Tried below before the Hon. James W. Swayne.

Appeal from a conviction of murder in the second degree; penalty, thirty-five years imprisonment in the penitentiary.

The opinion states the case.

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Lattimore, Cummings, Doyle, Bouldin & Splawn, and *B. D. Shropshire,* for appellant.—On question of court's failure to submit Article 41, Penal Code, with reference to the use of intoxicating liquors: Edwards v. State, 54 S. W. Rep., 589; Navarro v. State, 43 S. W. Rep., 105; Lawrence v. State, 65 Tex. Crim. Rep., 93, 143 S. W. Rep., 636; Phillips v. State, 50 Tex. Crim. Rep., 481, 98 S. W. Rep., 868; Hierholzer v. State, 83 S. W. Rep., 836.

On question of misconduct of jury: Wilson v. State, 39 Texas Crim. Rep., 365.

On question of failure to prove corpus delicti; Conde v. State, 35 Texas Crim. Rep., 98; Lucas v. State, 19 Texas Crim. App., 79; Harris v. State, 28 id, 308; Gay v. State, 49 S. W. Rep., 612; Hunter v. State, 31 S. W. Rep., 674.

C. E. Lane, Assistant Attorney-General, and *John W. Baskin,* county attorney, for the State.—Cited cases in opinion.

PRENDERGAST, JUDGE.—On December 22, 1911 appellant was indicted by the grand jury of Tarrant County for the murder of Maude Tatum on December 4, 1911. He was convicted of murder in the second degree and his penalty fixed at thirty-five years confinement in the penitentiary.

There were five counts in the indictment; the court submitted but three of them. One of these charged, besides the other necessary averments, that he murdered Maude Tatum by striking, wounding and bruising her with his fists, from the effects of which she instantly died; another, that he murdered her by beating, wounding and bruising her with a weapon, that he murdered her by beating, wounding and bruising her with a weapon, the name, character and description of which is unknown to the grand jury, from the effects of which she instantly died; the other, that he murdered her by choking and strangling her, from the effects of which she instantly died.

The record is somewhat voluminous, but it will be necessary to give only a brief summary of the evidence in order to discuss and decide the questions raised.

Deceased, Maude Tatum, was a prostitute. Appellant was a married man. They both lived in Fort Worth. Appellant, at the time of the death of the woman, and for some time prior thereto, had "kept" her. She had a room over a saloon, and appellant frequently stayed there at night with her. The saloon-keeper, Harry Hamilton, and his wife also occupied a room over the same saloon. They knew of the relations between appellant and deceased, and knew that he kept her there. Soon after noon on December 4, 1911, these four persons went to the country in a two-seated hack, carrying with them a considerable quantity of beer and whisky. They were all apparently friendly during the evening. They drank the beer and whisky during the evening, and returned to Fort Worth just about or be-

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fore night and went to two or three different saloons where they drank more or less before returning to their rooms. The two women perhaps drank more than the men. Anyway, they all got more or less drunk. The two men took the women in the hack to the saloon where their rooms were, the women getting out and going up to their rooms, the men taking the hack to the stable, and then returning to this saloon over which the women were. Both of them took several drinks before returning. The two men got back to Hamilton's saloon where the women were about 8 o'clock or before. Appellant went up into the deceased's room, the other woman having gone to hers. Very soon afterwards Hamilton, who remained downstairs in his saloon, heard appellant slapping or beating the deceased up in her room. He went up there and interfered. Appellant was slapping her in the face with his hands, using considerable force. Hamilton interfered and got him to stop beating the woman at that time. When Hamilton went up and interfered with appellant when he was slapping the woman, appellant said to him that she was his woman and he could whip her if he wanted to. When Hamilton interfered and started to pull appellant out of the room at this time, appellant said something about slapping him, too. Hamilton then left and went back into his saloon. About 11 o'clock the woman came down from the room and went out in town somewhere. Appellant remained there, it seems, in bed. The evidence shows that appellant was then drunk, but does not show that he drank any more after getting to deceased's room about 8 o'clock. The woman returned to Hamilton's saloon from out of town somewhere about 12 o'clock and went up to her room. Appellant was up there in her bed. About 2 o'clock Hamilton found her at the foot of the stairs too drunk to go up. He called help and took her up to her room and laid her on her bed. Appellant then got up and sat on the edge of the bed. Appellant then commenced to beat her again in the face, slapping her in the face, while she was on the bed flat on her back too drunk to do anything. Hamilton, the witness, again interfered and tried to stop him, and finally did get him to stop. During this time appellant took the water pitcher off the washstand and threw it at her head, but because of the interference of the witness and warding off the lick he missed her. She was then so drunk she could not get out of bed, and was in an unconscious condition. When Hamilton, the witness, and another, who was then with him, undertook to prevent appellant from beating up the woman again, he said, "I will kill that blonde-headed whore if I want to"; that she was his woman, and he could kill her if he wanted to. Finally Hamilton stopped him and he agreed to behave himself and to go to bed. The witness Hamilton, it seems, did not go upstairs to go to bed with his wife until about 2 o'clock that night. In order to do so he had to pass Maude Tatum's door, and he then saw her and appellant in her room. Later he saw appellant go out of the woman's room; cover her up, put out the lights and shut

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the door. In covering the woman up with the bed covers he spread it up over her head. Hamilton asked him where he was going, and he said he was not going to sleep with that blond-headed bitch that night, that she was drunk, and he was going home, and he went downstairs and left. It seems that no one saw the woman any more from 2 o'clock after appellant went out of her room, as just stated, until about 8 o'clock the next morning. There is no evidence or intimation whatever that anyone else other than appellant was in her room at all that night other than the witness Hamilton and the party who went with him up there at the time they last took her up the steps, and that they only stayed there a short time after appellant began to beat her up and threw the pitcher at her until they left the room. The next morning Hamilton and his wife found the woman dead. Blood was all over the pillow; it was saturated with it, and the blood had run into and entirely through the mattress. Her face was black and blue; she was lying with her face down, and a large pool of blood was about her face. There were marks on both sides of her throat; there was a bruise across the forehead and her lips, and black marks around her throat and around her neck, and both eyes were black, and marks on both sides of her throat. The body of the dead woman was removed to an undertaker's. She was washed, dressed and her body embalmed. One of the doctors who saw her there testified that her whole face looked like it had been pounded. Another one of the witnesses who described her condition soon after she was found dead said her face was bruised, lips swollen and eyes swollen; in fact, her entire face was swollen very badly; there were bruises on her neck and her breast around her. The end of the pillow slip was saturated in blood and the bed had spots of blood all in it.

Appellant complains that the court erred in overruling his motion for continuance. His bill on this subject is very meager. Taking the motion, the bill and the record, it clearly shows such a lack of diligence on his part to procure the attendance of the claimed absent witnesses, that the court did not err in overruling it.

Each count of the indictment submitted was amply sufficient, and the court did not err in overruling appellant's motion to quash it.

The court did not err in submitting that count in the indictment charging that appellant killed deceased by beating and bruising her with a weapon, the name, character and description of which was to the grand jury unknown, on the claimed ground that there was no evidence to justify the submitting of any such question. The condition of the deceased when she was found dead the next morning, and the fact that appellant, the last time he was seen to have assaulted her, threw a water pitcher at her, and the other facts and circumstances of the case, did authorize the court to submit this count in the indictment to the jury, and the court did not err in so doing.

Another contention of appellant by his motion for new trial is in this language: "Third: Because the court committed fundamental

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error in failing to charge Article 41 of the Penal Code, in regard to intoxication of the defendant, as the evidence clearly raised this issue and the court should have given this law in charge to the jury.'' This is the entire complaint in the motion for new trial. Appellant requested no charge on the subject. After the adjournment of the court there appears in the record a bill of exceptions to the refusal of the court to charge this article 41 of the Code, but it is just about as general as this ground of the motion for new trial is. No such bill appears to have been taken at the time of the trial, and no bill was at any time taken; merely this bill was taken and allowed after the adjournment of the court. This is entirely too general to be considered by this court. Byrd v. State, 151 S. W. Rep., 1068, and cases there cited.

But if we should consider this the record does not show that appellant claimed that he was insane from the recent voluntary use of intoxicating liquors at all; the evidence does not raise the question at all; it shows that appellant was at himself all the time, knew what he was doing, and did beat up this woman repeatedly during the night, and in no way indicated or claimed that he was then insane from the recent use of intoxicating liquors or from any other cause. The sole fact that he was drunk did not raise the question and did not require the court to charge on the subject. In the case of Ex parte Evers, 29 Texas Crim. App., 539, soon after the enactment of this statute, this court, in a well considered opinion, construed said statute, and, after reviewing the occasion for the enactment thereof and the purpose thereof, said:

''A casual glance at the said statute manifests the intention of the Legislature to be that intoxication shall not 'mitigate either the degree or the penalty of crime.' It is also to be seen that in cases of murder 'evidence of temporary insanity produced by such use of ardent spirits may be introduced by the defendant for the purpose of determining the degree of murder of which the defendant may be found guilty.'

''Viewing the statute in the light of the previous decisions, the language employed therein, and the evident intention of the legislative mind to be gathered therefrom, we are of the opinion that the only construction that can be placed thereon is that since the passage of that law evidence of drunkenness alone will not be admitted for the purpose of mitigating murder from the first to the second degree. It is manifest from the statute that in cases of murder the party accused stands before the law to be tried without reference to his mental or physical condition with reference to drunkenness if the intoxication be caused by the 'voluntary recent use of ardent spirits,' and such intoxication does not reach the stage of temporary insanity. This is not a novel question in this court. This same question came up for decision in Clore's case, in which this court said: 'We think it clear that the legislative intention was, first, that mere intoxication from recent use of ardent spirits should not of itself in any case excuse

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crime; second, that mere intoxication should neither mitigate the degree nor the penalty of crime; third, temporary insanity produced by such use of ardent spirits is evidence which may be used in all cases in the mitigation of the penalty and also in murder, for the further purpose of determining the degree. Of itself intoxication is neither a justification, mitigation nor excuse of any sort of crime. It must go to the extent of producing temporary insanity before it will be allowed to mitigate the penalty, and in murder, before it can be considered in determining the degree. This is our understanding of the proper construction to be placed upon the language of the statute.' Clore v. The State, 26 Texas Crim. App., 624.

"It will be observed that the statute has no reference to drunkenness other than voluntary, nor does it refer to insanity other than temporary, and such only as is produced from such use of 'ardent spirits.' The construction herein placed on this statute is believed to be in strict accord with the legislative will and intention, and the only construction that can be legitimately placed thereon. It is a fundamental principle that in the construction of a statute the legislative intent, if that intent can be ascertained, must govern. The design of all rules of construction of statutes is to furnish guides to assist in arriving at the intention of the Legislature. Willson's Crim. Stats., sec. 17; Whitten v. The State, ante, 504.

"The statute before us hardly needs construction. Its language is plain and its purpose easy of access, and lies on the surface of the terms employed. The mere fact of intoxication at the time of a homicide will not affect the crime nor the degree of murder in this State as the law now stands. Clore v. The State, 26 Texas Crim. App., 624; Willson's Crim. Stats., sec. 92."

This construction of this statute has at all times been adhered to by this court. There is no need to cite the other cases, though there are many to the same effect.

The court at which this trial occurred convened on January 1, 1912, and adjourned for that term on March 31, 1912. On March 30th the court heard and overruled appellant's motion for new trial. The order shows that the court heard evidence on the motion before acting on and overruling it. There appears in the record a bill of exceptions filed on May 14, 1912, some month and a half after the adjournment of court. In this bill is attempted to be given what was the testimony on hearing appellant's motion for new trial, in which it is claimed that there was some misconduct of the jury. The court stated in this bill, in allowing it, that after hearing the testimony he came to the conclusion that the verdict was not reached by lot, and that the fact of the defendant not testifying was not discussed in the jury room by the jury prior to the verdict. It is the uniform holding of this court that the statement of facts, whether by bill or statement of facts otherwise, based on grounds in the motion for new trial attacking the verdict for misconduct of the jury, must be filed during term time in

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order to authorize this court to consider it. This not having been done in this case, we could not be required to pass upon this question, but even if we did, the bill as qualified by the court would show no error. Knight v. State, 144 S. W. Rep., 980, and cases there cited.

Appellant contends that the evidence does not establish the corpus delicti. We think it fully does so. The condition of the body of the deceased when found dead the next morning after appellant left it at 2 o'clock the night before, with all the surrounding facts and circumstances, shows that the deceased was killed by violence to her person, and that appellant and no other killed her. There is no indication from the evidence, to our minds, that she committed suicide or attempted to commit suicide. The court fairly and substantially submitted this question to the jury, and they found against appellant on it. The evidence satisfies us and fully authorized the jury to believe and find as it did, that the assaults committed upon this woman by the appellant produced her death. No other theory has any support in the testimony.

No other question is raised requiring any discussion by us. We have carefully considered all of appellant's complaints and the able brief of appellant, but find no reversible error.

The judgment is affirmed.

Affirmed.

[Rehearing denied April 16, 1913.—Reporter.]

BABE SUMMERLIN V. STATE.

No. 2261. Decided February 5, 1913.

1.—Assault to Murder—District Judge—Special District Judge.

Where, upon trial of assault to murder, the district judge was called to the bedside of a sick child during the trial, and thereupon one of the counsel of the defendant and the district attorney agreed upon a special judge to proceed with the trial, the judgment of conviction, in the absence of the regular judge, is a nullity and void; it not being shown that the regular judge was disqualified.

2.—Same—Constitutional Law—Special Judge.

The election by agreement of parties of a special judge when the regular judge is disqualified must be done under the Constitution and laws of the State or the judgment is a nullity. Following Abrams v. State, 31 Texas Crim. Rep., 449.

3.—Same—Rule Stated—Jurisdiction and Consent.

Parties cannot independently of constitutional or statutory provision confer judicial authority upon a special judge, and where this is attempted, a judgment by the appointee is a nullity, and the parties will not be estopped by their consent from denying the jurisdiction. Legislation is suggested.

4.—Same—Special Judge—Oath of Office.

A special judge who is otherwise legally appointed or selected must take the oath of office in order to justify his sitting in the case trying it.

Appeal from the District Court of Fisher. Tried below before the Hon. Jno. B. Thomas.

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Appeal from a conviction of assault with intent to murder; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

L. B. Allen, for appellant.—On question of special judge: Early v. State, 9 Texas Crim. App., 476; Davis v. State, 44 Texas, 523; Reed v. State, 55 Texas Crim. Rep., 137; Oats v. State, 56 Texas Crim. Rep., 571; Perry v. State, 14 Texas Crim. App., 166; Wilson v. State, 14 id, 205; Smith v. State, 24 id, 290; Blanchette v. State, 29 id, 46.

C. E. Lane, Assistant Attorney-General, for the State.—Cited Necome v. Light, 58 Texas, 141; Chambers v. Hodges, 23 id, 104; Gains v. Barr, 60 id, 676; Lacy v. Barrett, 75 Mo., 469.

DAVIDSON, PRESIDING JUDGE.—This conviction was for assault to murder. The case proceeded to trial under the regular judge of the District Court until it reached that stage where the record states "The State and defendant here rests." It seems from this that the trial had proceeded to a point where the State had introduced its evidence and defendant had introduced his evidence. At this point the regular judge was called over the phone from his home in another county, informing him that his child was ill and was worse, the child having been sick for some time. While the judge was attending the call at the phone Mr. Allen, counsel for appellant, also absented himself from the courtroom after a conversation with the judge and went to his office for a short time. After being informed of the condition of his child the judge desired to leave the court and go to his home. It was then agreed by Judge Woodruff, who was also engaged in the defense, and the district attorney that they would select another member of the bar, to wit: Mr. McRae. This was reduced to writing and appears of record Mr. Allen, it seems, was not present and did not sign the agreement. The appellant did not sign the agreement or agree to the special judge. It may be proper here to state that Judge Woodruff was only incidentally in the case. Mr. Allen was appellant's attorney. Mr. McRae was called and set as special judge during the remainder of the trial, the regular judge having taken his departure for his home. After Mr. McRae assumed the bench the State introduced four witnesses in rebuttal, and the case proceeded, the jury having been instructed by Judge McRae, who, after considering the case, returned a verdict finding appellant guilty of assault to murder, assessing his punishment at two years confinement in the penitentiary. The verdict was received, the jury discharged and judgment entered. On motion for new trial there came a contest in regard to the authority of Judge McRae to act as special judge. It is testified by Judge McRae, as shown by the bill of exceptions, that he did not take the oath of office, and there was some evidence to the effect that Judge Woodruff stated to the district attorney that no advantage would be taken of any

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formalities with reference to the selection and incumbency of Judge McRae as special judge. Judge Woodruff was not present or used as a witness in regard to this phase of the case. So we may state or sum up the matter in this wise: Judge Thomas, the regular judge, left the court in the midst of appellant's trial and went home. By agreement of counsel Judge McRae was selected in his stead to continue the trial; that Judge McRae did not take the oath of office, and that Judge Thomas, the regular judge, was in no manner disqualified to act as judge; that he simply vacated the bench to attend the bedside of his sick child. Under this state of case appellant contends that the judgment is void for two reasons: first, that Judge McRae could not act as special judge in view of our constitutional and statutory enactments and requirements, and, second, that he did not take the oath of office, and therefore he was not a special judge. We are of the opinion that these contentions are well taken.

The Constitution provides that "no judge shall sit in any case wherein he may be interested or when either of the parties may be connected with him either by affinity or consanguinity within such degree as may be prescribed by law, or when he shall have been of counsel in the case. * * * When a judge of the District Court is disqualified by any of the causes above stated, the parties may by consent appoint a proper person to try said case, or upon their failing to do so a competent person may be appointed to try the same in the county where it is pending in such manner as may be prescribed by law, and the district judges may exchange districts or hold court for each other when they may deem it expedient and shall do so when required by law." There was no contention nor is it fact that Judge Thomas, the regular judge, was disqualified. So it is unnecessary to discuss that phase of the law. The statute, article 1675, Revised Civil Statutes, enumerates the disqualifications set out in the Constitution and provides no district judge can sit in any case under any such circumstances. There are three modes by which a judge may be selected to take the place of the regular presiding judge: First, where the regular judge fails to appear at the appointed time and place for holding his court, an election of a special judge shall be held in accordance with the statutory provisions; second, where the regular judge is from any cause disqualified to try the case the parties thereto may select a special judge to try the case by agreement; third, should the parties fail to agree, the district judge shall certify the fact to the Governor, who shall appoint a special judge to try the case. It is unnecessary to consider the first and third grounds. The contention is that inasmuch as the regular judge was not disqualified, there could be no agreement under the statute to have a substitute judge. The statute, article 1677 of the Revised Civil Statutes, reads as follows: "Whenever a special judge is agreed upon by the parties for the trial of any particular cause, as above provided, the clerk shall enter in the minutes of the court as a part of the proceedings any such cause

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and record showing, first, that the judge of the court was disqualified to try the case, and, second, that such special judge, naming him, was by consent agreed upon by the parties to try the cause, and, third, that the oath prescribed by law had been duly administered to such special judge." The previous articles 1675 and 1676 have reference only to where the regular judge is disqualified from sitting as a judge. It does not include any authority or suggestion in any of the provisions of any of these statutes that there can be an agreed judge except where the regular judge is disqualified. The disqualifications have been previously mentioned. It is, therefore, deducible, and correctly, from these provisions of the law, that Judge Thomas, first, was not disqualified, and, second, that until the regular judge is disqualified, the agreement of parties mentioned in the article above quoted cannot become operative, and, third, that by the plain provisions of the statute it is only when the regular judge is disqualified that parties are authorized to agree upon a special judge.

Referring to the Code of Criminal Procedure, we find that article 617 reads as follows: "No judge or justice of the peace shall sit in any case where he may be the party injured or where he has been of counsel for the State or the accused, or where the accused or the party injured may be connected with him by consanguinity or affinity within the third degree." Article 618 of the Code of Criminal Procedure thus provides: "If a judge of the District Court shall be disqualified from sitting in any criminal action pending in his court, no change of venue shall be made necessary thereby, but the parties or their counsel shall have the right to select and agree upon an attorney of the court to preside as special judge in the trial thereof." The following article 619 in substance provides that should the parties fail to agree on or before the day set for the trial of the criminal docket, the district judge shall certify the fact to the Governor, who shall appoint some practicing attorney learned in the law to try such case, and article 620 requires before the special judge enters upon his duties as judge he shall take the oath of office required by the Constitution, and that his selection by the parties or appointment by the Governor, as the case may be, and the fact the oath of office was administered to him shall all be entered upon the minutes of the court as part of the record of the case. Thereafter he shall have all the power and authority of the district judge that may be necessary to enable him to conduct, try determine and finally dispose of the case. It will be seen that these provisions in the Code of Criminal procedure, which relate perhaps more to the trial of criminal cases than those in Revised Civil Statutes, only authorize, as does the Civil Statutes, the selection by agreement of parties of a special judge when the regular district judge is disqualified. So it will be seen that from any view point of the constitutional provision and statutory enactments, there is no authority whereby the parties may agree to a special judge in a case like this. That before a special judge can be agreed upon under the circum-

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stances of this case, the regular judge must be disqualified to sit. There is no where in our law a disqualification of a judge by reason of the sickness of any member of his family. The constitutional disqualifications have been mentioned. Article 617, supra, it seems has provided another, to wit: That if the district judge is the injured party, or is related within the inhibited degree to the injured party, this may serve as a disqualification. It is unnecessary to discuss this phase of the statute as to whether it is constitutional or not, because it does not arise in the case. The regular district judge was not the injured party, nor was he related to the injured party. In order to constitute a special judge under the law his appointment or selection must come within the provisions of the law. This has been held to be mandatory and prerequisite. In Abrams v. State, 31 Texas Crim. Rep., 449, these matters were reviewed at some length, and the conclusion reached that "a judgment rendered by a court presided over by a disqualified judge is a nullity, and the case would remain undisposed of as completely as if the judge had not been present at the court," citing a great number of cases in support of the statement. And it has always been held that where a judge is disqualified, he cannot be permitted to sit in the case, even with the consent of the parties; that such consent could not remove the disqualification or incapacity and authorize the judge to sit against the prohibitions of the law. These provisions of the law are designed not merely for the protection of the parties to the suit, but for the general interest of society. It is true that in the Abrams case the question at issue was the disqualification of the judge. The issue here would be more correctly stated in this way: that the attorney who acted as special judge was unauthorized to sit in the case, and that, therefore, there could be no judgment; that under no phase of the law could he be constituted a judge, and, therefore he did not preside over a court that tried the case and rendered the judgment. It has also been held that where the mode of selection of special or substitute judges is prescribed by law and the causes for such selection are indicated, other modes and other causes are thereby excluded. This is especially true if these are set forth in the Constitution. It is also laid down as a correct rule that parties cannot independently of constitutional or statutory provision, confer judicial authority, and where this is attempted a judgment by the appointee is a nullity. Nor will the parties be estopped by their consent from denying the jurisdiction. In support of the proposition that the appointment under such authority would be a nullity, see Hyllis v. State, 45 Kan. 478; Dansby v. Beard, 39 Ark. 254; Gaiter v. Wasson, 42 Ark. 126. Without giving the style and number of other cases in support of the rule above stated, we cite the decisions of Colorado, Iowa, Illinois, Indiana and Tennessee. And in support of the second proposition, that is, that the parties will not be estopped by their consent from denying jurisdiction, we cite the decisions of Colorado, Georgia, Illinois and Indiana. Many

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of these decisions will be found collated in notes 2 and 3, 11 Ency. of Pleading and Practice, page 788. In this connection, we desire to call the attention of the Legislature to the fact that the different statutes, both in Revised Civil Statutes and Revised Code of Criminal Procedure are incongruous, and would suggest the proper legislation be had in order to harmonize these different statutes.

It will be readily seen from the statutes above quoted and cited that the substitute or special judge must take the oath of office. Therefore, to restate briefly, the selection of Mr. McRae as special judge in the case was not authorized by the Constitution or statute; that the selection of a special or substitute judge by agreement of the parties is only authorized when the regular judge is disqualified from sitting; that appellant did not waive or lose any of his rights in the matter by agreeing to the selection of the substitute judge; and that a special judge must take the oath of office in order to justify his sitting in the case trying it.

There are some other matters suggested for revision, but in the light of what has been said we deem it unnecessary and perhaps would not be justified in treating those subjects inasmuch as the case was not authoritatively tried.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

ARCADIO MARTINEZ ET AL. V. STATE.

No. 1982. Decided February 5, 1913.

1.—Assault to Murder—Statement of Facts—Ninety Days Limit.

Where the statement of facts and bills of exception were filed four months and one day subsequent to the adjournment of the trial court, the same cannot be considered on appeal, and this, although the attorneys representing them on the trial abandoned the case and other attorneys were employed, no sufficient reason being shown why diligence was not used by the defendant to file said statement of facts and bills of exceptions within ninety days from adjournment of court.

2.—Same—Assignments of Error.

Assignments of error filed four months subsequent to the adjournment of the trial court cannot be considered; but if considered, there was no error. Following Wilson v. State, 52 Texas Crim. Rep. 173, and other cases.

3.—Same—Plea of Not Guilty—Apostrophe—Practice on Appeal.

Under Article 938, Code Crim. Proc. as amended, this court must presume that the defendant was arraigned and pleaded to the indictment, unless such issue is raised in the court below by proper bills of exception, and therefore, a contention that the judgment did not show that the defendants entered a plea of not guilty cannot be considered; besides, the record showed that such plea was made, and the improper use of an apostrophe is entirely too technical.

4.—Same—Charge of Court—General Objections.

Where the objection to the court's charge is that the court erred in not charging on mutual combat, as defendant's testimony warranted such charge, the same is entirely too general to be considered on appeal; besides, this issue

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was not raised by the evidence and there was no bill of exceptions or complaint in the motion for new trial.

5.—Same—Practice on Appeal—Assignment of Error.

Where errors are attempted to be pointed out for the first time in this court in the assignments of error and in the brief, they cannot be considered on appeal. Art. 743, C. C. P.

6.—Same—Objections—Practice on Appeal.

That the verdict and judgment are contrary to the law and the evidence is too general an objection, unless the evidence is insufficient to sustain the verdict, which it is not.

7.—Same—Jury and Jury Law—Bill of Exceptions.

In the absence of a bill of exceptions reserved to the formation of the jury or the selection of any member of the jury, the same cannot be considered on appeal.

8.—Same—Change of Venue.

In the absence of an application made to change the venue, and nothing in the record to disclose any reason therefor, there was no error.

9.—Same—Evidence—Papers in Civil Suits—Bill of Exceptions.

Where the bill of exceptions did not include the petition for divorce, which defendant desired to introduce, the question cannot be reviewed; besides, there was no error in excluding it. Following Fifer v. State, 64 Tex. Crim. Rep. 203, 141, S. W. Rep., 989.

10.—Same—Evidence—Res Gestae.

Where the exclamation of the injured party introduced in evidence was res gestae, the same was admissible; besides, the bill of exceptions raising this question was defective.

11.—Same—Evidence—Aggravated Assault.

Where, upon trial of assault with intent to murder, defendant attempted to introduce testimony as to improper relations between his wife and the alleged injured party, but the record showed that he had since frequently met such injured party in a friendly way, the same was inadmissible to reduce the degree of the offense, even if the statements of facts and bills cf exception were considered.

12.—Same—Reform of Judgment—Verdict—Practice on Appeal.

Where the verdict assessed the punishment against one of the defendants at five years in the penitentiary, and the judgment and sentence for a period of ten years, this court, under Article 938, Code Criminal Procedure, will correct and reform the judgment so as to make it conform to the verdict. Following McCorquodale v. State, 54 Texas Crim. Rep., 344.

Appeal from the District Court of Ward. Tried below before the Hon. S. J. Isaacks.

Appeal from a conviction of assault with intent to murder: penalty, ten and five years respectively in the penitentiary.

The opinion states the case.

Hefner & Cook, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.—On question of filing bills of exception: Presley v. State, 60 Tex. Crim. Rep., 102, 131 S. W. Rep., 332.

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HARPER, Judge.—Arcadio Martinez, Ruberto Grecia and Edubijen Guzman were indicted, charged with assault to murder, convicted of that offense and sentenced to the penitentiary.

Appellants were convicted at a term of the District Court of Ward County which adjourned on January 27, 1912. No statement of facts or bills of exception were filed in the trial court until May 28, 1912—four months and one day subsequent to the adjournment of court. In the record we find an application for an extension of time and permission to file a statement of facts and bills of exception, dated May 5, 1912, claiming that the attorneys who had represented appellants on the trial of the case, without their knowledge, had neglected and failed to file bills of exception and statement of facts, and that the motion was made as soon as the defendant became advised of the facts, and that unless a further extension was granted it would be impossible for them to perfect the record; that as soon as they were informed of the circumstances they immediately employed the attorneys whose names are signed to the application.

It is true that the record discloses that appellants were in jail, and were carried from Ward County (that county having no secure jail) to Reeves County for safe keeping, but does this excuse them from all diligence in the matter? It will be seen that it was ninety-eight days after adjournment of the court for the term before the date of the application filed by the present attorneys, and while it is doubtless true this is the first time the attorneys' attention was called to the matter, yet were appellants not themselves guilty of inexcusable negligence? Certainly if these attorneys who represented them on the trial did not call on them during this time, and they heard nothing from them, it would put any ordinary man on inquiry before the lapse of more than three months time. We do not think such negligence is excusable, for no sufficient reason is shown why diligence was not used by them within the time allowed by law. From the same source they obtained this information on or about May 5th, upon inquiry it could have been obtained at a time within the period allowed by law for filing these papers. We have gone the full limit authorized by law in considering statement of facts if filed within ninety days from the date of adjournment of court, and further time we cannot grant unless some reason should be shown whereby from sickness or some unavoidable reason the defendants were prevented from using proper diligence within the period granted. The statement of facts and bills of exception will be stricken from the record.

But if we should consider them, together with the amended motion for new trial, no error that should cause the reversal of the case is presented. Under no circumstances would we be authorized to consider the assignments of error filed four months subsequent to the adjournment of court. Art. 743 of the Code of Criminal Procedure; Pena v. State, 38 Texas Crim. App., 333; Sue v. State, 52 Texas Crim.

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Rep., 122; Wilson v. State, 52 Texas Crim. Rep., 173; Cornwell v. State, 61 Texas Crim. Rep., 122, 134 S. W. Rep., 221.

The complaint, made for the first time in this court, that the judgment of conviction does not show that all the defendants entered a plea of not guilty, cannot be considered. Appellants in their brief quote a great number of decisions of this court rendered prior to 1897, but they take no notice that those very decisions caused the Legislature in 1897 to amend the Code of Criminal Procedure, and provide in Article 938: "In all cases the court shall presume that the jury was properly impaneled and sworn; that the defendant was arraigned; *that he plead to the indictment*, unless such matters were made an issue in the court below, and it affirmatively appears to the contrary by a bill of exceptions properly signed and allowed by the judge." No such contention was made in the trial court, consequently we must conclusively presume that appellants plead to the indictment, and our decisions all so hold since the adoption of this provision of the Code of Criminal Procedure. But if we look to the record we think it shows that the defendants did enter their pleas. The judgment reads: "came a jury of good and lawful men, to wit: Lee F. Freeman and eleven others, who having been selected, were duly impaneled and sworn, and who having heard the indictment read by the district attorney and the defendant's plea of not guilty," etc. The criticism that the use of the apostrophe before the letter "s" in the word "defendants" is highly technical when the judgment as a whole shows that a plea was entered by all of them. However, the Code is now conclusive that such error cannot be assigned for the first time in this court.

The only complaint of the charge of the court contained in the motion for new trial, or in the amended motion, reads as follows: "Because the court erred in not charging on mutual combat, as defendant's testimony warranted such charge." This has frequently by this court been held to be too general to present any question for review. (Mansfield v. State, 138 S. W. Rep., 591.) But if we were to consider the evidence, this issue was not raised by the evidence. The evidence for the State would show an unprovoked assault, while the evidence of two of the defendants might present self-defense, and alibi as to Ruberto Grecia, but there was no bill of exceptions reserved to the charge and no complaint of it in these respects in the motion for new trial. The errors attempted to be pointed out for the first time in this court in the assignments of error and in the brief cannot be considered. (Art. 743 Code of Criminal Procedure.)

The ground in the motion "that the verdict and judgment are contrary to the law and the evidence," is too general to call our attention to any error unless the evidence was insufficient to sustain the verdict. If we were to consider the statement of facts, the evidence for the State amply supports the verdict.

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There was no bill of exceptions reserved to the formation of the jury, or to the selection of any member of the jury, therefore we could not review the three grounds in the motion relating to this matter.

The record does not disclose that there was even a verbal application made to change the venue, much less one in conformity with the Code, and nothing in the record discloses any reason why the venue should have been changed, and certainly under these circumstances these grounds present no error.

It is shown by the record, if we consider the bills, that appellant Martinez desired to introduce in evidence a petition for divorce he had filed against his wife two years prior to this difficulty. The record would also show a condonation on the part of said Martinez long prior to this difficulty, if his wife had done any wrong, and they had been again living as man and wife for a great length of time. The fact that Martinez had filed a suit against his wife would trace no motive of the allegations contained therein to the person assaulted in this case, and the court did not err in excluding the petition. In addition to this the bill does not include the petition nor any portion thereof, nor does the record disclose the petition desired to be introduced, consequently, the question is not presented in a way that we could intelligently review the action of the court. (Fifer v. State, 64 Tex. Crim. Rep., 203, 141 S. W. Rep., 989 and cases there cited.)

The record discloses that several persons heard the injured person exclaiming, "don't kill me," when they at once went to him and saw three persons going away. What he then said would be admissible as res gestae. However, the bill that seeks to raise this question contains only the question asked, and does not contain the answer of the witness. So it is not presented properly, but if it had been the testimony was properly admitted. Bill No. 7 is in the same condition. While it shows the question propounded, it does not disclose the answer of Dr. Mayhugh, if any answer he made.

In the only other bills in the record, if we consider them, it is claimed that some witnesses would have testified that two years prior to this difficulty they had heard the injured person, Ursulo Martinez, say he had improper relations with Antonio Martinez's wife. The bills also disclose that since said time Antonio and his wife had been living together; that for two years he had come almost in daily contact with Ursulo Martinez, and such testimony would not reduce nor tend to reduce the offense from assault to murder to aggravated assault. If a person is informed that another has had improper relations with his wife, he cannot thereafter be brought in almost daily contact with such person, and after a lapse of two years time have an offense reduced by reason of such conduct; in fact such evidence would go towards showing malice aforethought. So if we considered the bills of exception found in the record and the statement of facts, no ground in the amended motion for new trial would present any error, and we are prohibited by law from reversing a case on grounds

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presented for the first time in this court unless fundamental error is disclosed.

There is one matter called to our attention which should be considered. The verdict of the jury finding Ruberto Grecia guilty of murder in the second degree assesses his punishment at only five years in the penitentiary. The judgment of sentence in the record orders his confinement in the penitentiary for a period of ten years. By Article 938 of the Code of Criminal Procedure we are authorized to reform and correct the judgment if there is sufficient evidence of record by which to make the correction. The verdict of the jury being contained in the record, and it assessing the punishment of Ruberto Grecia at only five years in the penitentiary, the sentence as to him is hereby reformed so as to read "five years" wherever the words "ten years" appears in said sentence. McCorquodale v. State, 54 Texas Crim. Rep., 344, and cases cited in sec. 1262, White's Ann. Code Crim. Proc.

The judgment is affirmed. *Affirmed.*

C. P. YEARY V. STATE.

No. 2268. Decided February 5, 1913.

Aggravated Assault—Statement of Facts.

Where, upon appeal from a conviction of aggravated assault, no order of record appeared authorizing the filing of a statement of facts after term time, the same could not be considered.

Appeal from the County Court of Wichita. Tried below before the Hon. C. B. Felder.

Appeal from a conviction of aggravated assault; penalty, a fine of $150.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was prosecuted in the County Court and convicted of an aggravated assault, and his punishment assessed at a fine of $150.

In this case no order appears of record authorizing the filing of a statement of facts after term time, and it being a misdemeanor conviction, a statement of facts filed after term time cannot be considered.

The only grounds in the motion are that the judgment is against the weight of the evidence, and the court erred in failing to give a special charge requested, and in the absence of a statement of facts we cannot review these grounds.

The judgment is affirmed. *Affirmed.*

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TOM HOLLIS V. STATE.

No. 2267. Decided February 5, 1913.

1.—Burglary—Evidence—Description of Keys.

Where, upon trial of burglary, the circumstances indicated that the alleged room had been unlocked, there was no error in admitting testimony describing certain keys found in defendant's possession, one of which exactly fitted the keyhole of the door of the said room, and it was not necessary to exhibit said keys to the jury as the best evidence; besides, it was shown that the keys were lost.

2.—Same—Breaking—Sufficiency of the Evidence.

Under Article 1308, Penal Code, the unlocking and opening of a locked door and an entry thus effected, where the intent to steal is shown, or an actual theft is shown, this would be a breaking under the law, even though the burglar, after thus effecting an entry and committing the theft, in leaving should again close and lock the door and leave it in exactly the same condition as before he entered, and where such a state of facts were shown, the same was sufficient to sustain a conviction for burglary.

3.—Same—Charge of Court—Requested Charges.

Where, upon trial of burglary in the daytime, the court fully charged the law as applicable to the facts and also submitted the requested charges which were in point, and the evidence amply supported the conviction, there was no error.

Appeal from the District Court of Travis. Tried below before the Hon. George Calhoun.

Appeal from a conviction of burglary in the daytime; penalty, four years imprisonment in the penitentiary.

The opinion states the case.

A. S. Phelps, for appellant.—Upon question of actual breaking: Strickland v. State, 78 S. W. Rep., 689; Bird v. State, 87 S. W. Rep., 146; Johnson v. State, 88 S. W. Rep., 813; Martinus v. State, 47 Texas Crim. Rep., 528; Bates v. State, 50 Tex. Crim. Rep., 568, 99 S. W. Rep., 551; Jones v. State, 50 Tex. Crim. Rep., 100, 96 S. W. Rep., 44.

On question of admitting description of keys: Mann v. State, 27 Texas Crim. App., 580; Field v. State, 24 Texas Crim. App., 422; Morgan v. State, 25 id., 498.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—The appellant was convicted of burglary and his penalty fixed at four years in the penitentiary.

The evidence without contradiction shows that on the early morning of June 6, 1912, J. G. Franklin, who occupied a room in a house on the corner of Colorado and West 6th streets in the City of Austin, where he slept and kept his clothing, put down and fastened the shutters to all of the windows of the room and closed and locked the door, taking the key with him, and that later in the evening in the daytime

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of the same day he returned to his room and upon going therein found that his room had been entered; that the door to his wardrobe which he had also closed and locked was open, his bureau drawers open and his clothes scattered about and that a certain suit of clothes had been taken out of his wardrobe. He described this suit of clothes; that the entrance to his room was in the front door and up the stairway. It seems that his room was on the second floor. He knew that he left this suit of clothes in his wardrobe that morning and saw them there and when he got back that evening they had been taken away. He saw nothing wrong with the doors or windows when he returned and found that the suit of clothes was gone and his room had been entered and his clothes disarranged. The shutters to the windows were fastened inside. The windows were up. The blinds could not be opened from the ouside without a wire. That they catch with a hook. As soon as Franklin saw what had been done and missed his suit of clothes he called an officer who began an investigation and a search for the suit of clothes.

Joe Levi, a tailor, testified that appellant was in his place of business in Austin on the morning of June 6th and examined and talked about then buying from him a certain suit of clothes; that that same evening between 4 and 5 o'clock the appellant drove down in a surrey, drawn by a white horse, to his shop and he, supposing that he came to buy the suit he was looking at in the morning, asked him if he wanted the suit. Appellant replied that he wanted to make a trade with him and then got a bundle from the buggy or surrey, took it in Levi's shop, unwrapped it and took out a suit. Then told Levi that he wanted to make a trade with him and pay him some boot. He wanted Levi to take the suit of clothes he had and he, appellant, then pay him boot between Levi's suit and the one he offered. The suit that appellant then got out of this buggy or surrey was identified as Franklin's suit of clothes taken from his room that day, which was afterwards recovered. Levi said the suit appellant then had was a real good suit and he said to appellant, "that ain't your suit," because he saw the suit was for a short man and the appellant was a tall man. Appellant replied that it was his. Levi insisted that it was not because it did not fit him and he could not use it. Then he admitted that it was not his but that it belonged to a boy who worked with him. He asked appellant then where he worked and he told him he worked on West 6th street. They did not trade and appellant left, taking Franklin's suit of clothes with him. Before Levi closed his shop for the evening Mr. Starr, one of the policemen, came and had a conversation with him. Afterwards Starr showed him a suit of clothes which was the suit that appellant had and offered to trade to him on the evening of June 6th.

Mr. Starr, this policeman, testified that he was called to Franklin's place on the evening of June 6th and made an investigation there. He further testified that after making an investigation he

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hunted for appellant; that he knew where he lived which was at 11th and Lavaca streets in Austin at Mrs. Butler's place; that appellant's room at Mrs. Butler's was the servant's room up over the garage or carriage room; that he went to that room but did not at first see appellant; that he was hunting for the man who was described as the one who drove the said gray horse and surrey; that he found the gray horse and surrey at Mrs. Butler's; that someone had been occupying this servant's room over the garage or carriage room and clothes and things were in there. The witness looked through the room and found a hole in the mattress and three keys stuck back in there; that one of these keys would lock and unlock Franklin's room door, as though it was made for it. The keys were in a little hole in the mattress stuck back in it; he did not then arrest appellant; he was then only investigating; that he had some talk with the appellant before he arrested him. The next day, June 7th, after he arrested appellant, finding out that his mother lived in the east part of Austin, he went out to her house and there found and recovered Franklin's suit of clothes which were thoroughly identified by Franklin as the clothes stolen from him the day before and also identified by Levi as the clothes appellant showed to him and tried to trade to him on the evening of the 6th of June. After appellant was arrested, Mr. Starr, the policeman, transferred him to the custody of the constable and he was then placed in the county jail. At this time he turned over the three keys he had found in the appellant's room at Mrs. Butler's. The State then introduced the various officers and witnesses who would have come into possession of said keys, but all of them, though having searched for the keys, could not find them. The State, by its testimony on this line, probed every source where said keys ought or should have been but could not locate them. The State further proved that the appellant took the said suit of clothes to his mother's on the evening of the theft and left them there, where they were recovered the next morning.

The court gave a full and accurate charge, submitting for a finding every issue raised in behalf of the appellant and the jury found every issue against him. He required, in the definition of burglary, that a *breaking* must be done and defined breaking as follows: "By the term 'breaking' is meant the entry must be made with actual force. The slightest force, however, is sufficient to constitute breaking; it may be by lifting the latch of a door that is shut, or by the opening of a door that is shut and locked, or by raising a window." In another paragraph, he told the jury that the entry must be made by force with intent to commit the crime of theft and that they must be satisfied, from the evidence, beyond a reasonable doubt, that the entry was so made by force directly applied to the house and with the intent to commit theft. He also correctly charged on circumstantial evidence. He then, in another paragraph, in submitting the case to the jury for a finding, required them to believe that the appellant

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did then and there unlawfully, in the daytime, by force break and enter the said Franklin's house, etc.

Appellant has quite a lengthy bill of exceptions about the keys found and testified to by the policeman. The court, in approving the bill, stated: "I am only approving it (the bill) to the effect that an objection was made to the testimony in regard to the keys as set out in the bill, and the State then offered evidence showing that the keys testified about had been lost or misplaced as set out in the statement of facts, and after said testimony had been offered the court overruled defendant's objections to which defendant excepted." As we understand the bill as qualified, it in effect shows that when the witness Starr testified that he found the three keys stuck in the mattress in appellant's room at Mrs. Butler's servant's house, that the appellant objected to any such testimony or describing about what the keys were or that one of them would unlock Franklin's door, etc., claiming that the keys would be the best evidence. The bill shows that the court first excluded this testimony until, as stated in the qualification, the State showed that the keys had been lost or misplaced and after that was shown he admitted the proof about the officer finding the keys and where he found them and that one of them would unlock Franklin's door as if it had been made for that purpose. It is our opinion that this testimony, under the circumstances, was clearly admissible and that the court did not err in admitting it. We think the testimony would have been clearly admissible whether the keys were shown to have been lost or not.

The only other contention of appellant is that the evidence is insufficient to sustain the verdict. The principal point on which it seems, appellant makes this contention is that the evidence fails to establish that there was any *breaking* such as is contemplated by the statute, to constitute burglary. The statute itself, Penal Code, Article 1308, defines what is meant by breaking: "That the entry must be made with actual force. The slightest force, however, is sufficient to constitute breaking; it may be by lifting the latch of the door that is shut, or by raising a window, the entry at a chimney, or other unusual place, the introduction of the hand or any instrument to draw out the property through an aperture made by the offender for that purpose." The court in defining breaking substantially followed this statute, but correctly gave, as is clearly embraced by this statute, that breaking included "the opening of a door that is shut and locked."

In discussing this statute this court in Sparks v. State, 34 Texas Crim. Rep., 87, said: "We do not understand a daytime burglary to be circumscribed by these statutory illustrations, but that they are intended to illustrate that any force, however slight, if applied to the house, is used, and an entry is thus effected, the breaking and entry is complete; and in our opinion, if a door is shut and held in that position by friction of the door itself with the sill and facing,

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and it is pushed, pulled, or shoved open, it is a sufficient breaking and force to constitute a daytime burglary, if the other essentials of the offense are present." There can be no question, to our minds, that the unlocking and opening of a locked door and an entry thus effected, where the intent to steal is shown, or as in this case, an actual theft is shown, that it would be a breaking such as is clearly meant by this statute, even though the burglar, after thus effecting an entrance and committing the theft, in leaving should again close and lock the door and then leave it in exactly the same condition as before he entered.

The evidence in this case clearly and satisfactorily shows that Franklin, on the early morning of June 6, 1912, closed the blinds and shutters of his room, locked and closed the door and took the key with him; that in this thus closed room he left, among others, a suit of his clothes; that some one unquestionably entered this room in some way during his absence and stole this suit of clothes. Appellant was shown to have been in possession of that identical suit of clothes about the middle of the evening of that day and that he took it to his mother's, where it seems he lived, and left them there, and that they were recovered therefrom by the officer the next day and thoroughly identified as the stolen suit of clothes. That at the time appellant was seen with the clothes in the middle of the evening of June 6th he was driving a white horse hitched to a surrey and had this suit of clothes in that surrey at the time; that that white horse and surrey belonged to Mrs. Butler for whom he worked, in the City of Austin, at that time and that he had the servant's room over the carriage room at Mrs. Butler's where the officer that same evening, after searching, found three keys,—one of which would unlock and lock Franklin's door as if it had been made for that purpose. No one else is shown to have had anything to do with this suit of clothes, although appellant said to the witness Levi to whom he tried to trade the clothes that same evening, after first claiming them as his own, upon being repeatedly charged by Levi that they did not belong to him, that a boy that worked with him gave them to him to sell; and although his sister testified that some negro boy about eighteen years old, whom she did not know, who stated to her his name was Willie Wilson or Willie Williams, who was not produced on the trial, stated to her he wanted a suit he let appellant have. The court specifically charged that if appellant purchased or obtained the said suit of clothes from another person, or the jury had a reasonable doubt of that to acquit appellant, and the jury found this issue against him. In addition to this and in addition to what the court gave on what is meant by breaking he gave at appellant's request, these two charges:

1. "You are instructed that the mere possession of recently stolen property without evidence of a breaking, is not sufficient, under the law, to show burglary." 2. "If you believe, beyond a reasonable doubt,

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that some offense has been committed in this case, but have a reasonable doubt as to whether this defendant is guilty of burglary or of the offense or receiving stolen property, then, and in such event you will give the defendant the benefit of said reasonable doubt, and find the defendant 'not guilty' and so say by your verdict."

We think the evidence was amply and clearly sufficient to show that a breaking was made by the unlocking and opening of the door of Franklin's room. The evidence unerringly and inevitably points to appellant as that person and it does not point to any other person.

There being no reversible error, the judgment will be affirmed.

Affirmed.

J. H. HARRISON V. STATE.

No. 2063. Decided November 27, 1912.

Rehearing denied February 5, 1913.

1.—Accessory after Fact—Indictment.

Where, upon trial of accessory after the fact to the crime of seduction, the indictment followed approved precedent, the same was sufficient. Following Gann v. State, 42 Texas Crim. Rep., 133.

2.—Same—Sufficiency of the Evidence.

Where, upon trial of accessory after the fact to the crime of seduction, the evidence sustained the conviction and the court properly charged the law of the case, there was no error.

3.—Same—Bills of Exception—Practice on Appeal.

Where, upon appeal, the bills of exception did not set out the proceedings in the court below sufficiently to enable this court to know whether an error had been committed in the admission of certain testimony, the same cannot be considered.

4.—Same—Evidence—Principal—Accessory.

Where the testimony introduced, upon trial of an accessory after the fact to the crime of seduction, was admissible against the principal, the same was admissible against the accessory; however, the details of the operations to produce an abortion and the suffering it entailed would not have been admissible if the same had been properly excepted to. Following Tubb v. State, 55 Texas Crim. Rep., 606, and other cases.

5.—Same—Evidence—Defendant as a Witness—Grand Jury.

Where, upon trial of accessory after the fact to the crime of seduction, the State introduced defendant's testimony before the grand jury, and it appeared from the record that at that time he was not under arrest or charged with a crime in any manner, but voluntarily gave his testimony without claiming self-incrimination, there was no error; besides, the bill of exceptions was defective.

6.—Same—Evidence—Conspirators.

Where, upon trial of accessory after the fact to the crime of seduction, it was shown that defendant and others acted together in spiriting away a witness for the State by paying him money to leave the county of the prosecution, there was no error in admiting testimony as to the effort which the coconspirator made to secure said money, the defendant's connection therewith being substantially shown; besides, the bill of exceptions was defective.

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7.—Same—Charge of Court—Recalling Jury—Statutes Construed.

While the earlier decisions held that under article 754, Code Criminal Procedure, the judge was inhibited from further instructing the jury after their retirement, etc., it is now uniformly held that the judge may recall the jury and give them further instructions whenever he considers it necessary, and where he briefly and succintly told the jury what to do in answer to their question propounded, there was no error. Following Benavedias v. State, 31 Texas Crim. Rep., 173.

8.—Same—Charge of Court—Accessory—Principal.

Where, upon trial of accessory after the fact to the crime of seduction, the court properly charged the jury and distinctly required that if they had a reasonable doubt as to the guilt of the principal, to acquit defendant, there was no error.

9.—Same—Fugitive From Justice—Severance—Practice on Appeal.

Where it appeared that the principal, in a prosecution of the accessory, was a fugitive from justice, but it appeared from the record that defendant made no motion to require the State to first try the principal and did not show that the principal had been arrested or could be tried, a complaint in a motion for new trial on this ground came too late.

10.—Same—Definition of an Accessory after the Fact—Spiriting Away Witnesses.

Where, upon trial of an accessory after the fact to the crime of seduction, it appeared from the record on appeal that the defendant in order to prevent his principal from being indicted, arrested and tried, spirited away or hired the material State's witnesses to leave the county so that they could not be had before the grand jury or the trial of said principal before the court, held that this is such aid personally and directly to the offender as would make the defendant an accessory after the fact, under Article 86, Penal Code. Following Blakely v. State, 24 Texas Crim. App. 616. Qualifying Caylor v. State, 44 Texas Crim. Rep., 118, and other cases.

11.—Same—Definition of Accessory—Cases Qualified—Disapproved.

See opinion for construction of Article 86, Penal Code, qualifying and partly disapproving the following cases: Shaekey v. State, 41 Texas Crim. Rep., 255; Chenault v. State, 46 Texas Crim. Rep., 351; Hargrove v. State, 63 Texas Crim. Rep., 143; Chitister v. State, 33 Texas Crim. Rep., 635; Gann v. State, 42 Texas Crim. Rep., 133; Miller v. State, 72 S. W. Rep., 996; Dent v. State, 43 Texas Crim. Rep., 126.

Appeal from the District Court of Comanche. Tried below before the Hon. J. H. Arnold.

Appeal from a conviction of accessory after the fact; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Smith & Palmer, for appellants.—On question of the court's charge on seduction: Nash v. State, 61 Texas Crim. Rep., 259, 134 S. W. Rep., 709.

On question of definition of accessory after the fact: Caylor v. State, 44 Tex. Crim. Rep., 118, and cases stated in opinion.

On question of escape of principal: Williams v. State, 27 Texas Crim. App., 466; West v. State, 27 id., 472.

On question of defendant as a witness before the grand jury: Gutgesell v. State, 43 S. W. Rep., 1016.

C. E. Lane, Assistant Attorney-General, for the State.

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PRENDERGAST, JUDGE.—The appellant was indicted as an accessory to the crime of seduction. The indictment properly charged that Sam Wimberly on October 15, 1910, seduced Mattie Waldrip. Then the indictment properly charged appellant as an accessory in that, knowing that said Wimberly had committed said offense of seduction, with the purpose and in order that said Wimberly might evade a trial for said offense so committed by him, did unlawfully and willfully conceal and give aid to him. The jury convicted him and fixed his penalty at the lowest,—two years in the penitentiary.

The indictment follows as literally as it can, the form prescribed by Judge White, in his Annotated Penal Code, sec. 108, and is sufficient, expressly so held by repeated decisions of this court. Gann v. State, 42 Texas Crim. Rep., 133.

It is unnecessary to detail the evidence. The appellant neither testified nor offered any evidence. The testimony was amply sufficient to justify the jury to believe and find that said Wimberly was guilty of the crime of seducing said Mattie Waldrip, as charged in the indictment, which question was properly submitted by the court to the jury requiring such finding by them before they could convict appellant.

The testimony was amply sufficient to justify the jury to believe and find that, after said Wimberly had committed said crime of seduction by illicit intercourse with Mattie Waldrip, he got her in family way, and that a short time before the grand jury convened at which this investigation was made and indictment found, he procured an abortion to be had upon her; that about a month after the abortion the grand jury convened and began investigating all this matter and, among others, had had as a witness Mattie Waldrip's brother Tom before it with whom she then lived and for several months prior thereto had lived, together with another sister; that she had also just been summoned by the grand jury to appear before it as a witness in the same matter. Her father, T. G. Waldrip, was also a material witness in the matter and if he had not already been, doubtless would have been summoned before the grand jury as a witness in said investigation as the evidence justified the jury to believe appellant knew and anticipated. Mattie Waldrip and her sister, Myrtle Waldrip, and brother Tom lived some ten or twelve miles distant from where her father, T. G. Waldrip, lived. They all lived some considerable distance from the town of Comanche, county seat of Comanche County, where the grand jury was in session. Tom was before the grand jury on Wednesday, as a witness in said investigation. On Thursday his father went by for him and they together went to the little town of Gustine to purchase some supplies. It seems that this town was the trading point of said Waldrips and somewhere not far from the location of appellant, said Wimberly and others connected with this matter; that along about the middle of the evening after said Waldrip had made his purchases and was at or in his buggy waiting for

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his son Tom to leave Gustine and return to their homes, he was approached by appellant who introduced himself to said Waldrip. Appellant proceeded to engage Waldrip for a while in general conversation then brought up to him the trouble he and his said daughter Mattie were having, and, after thus bringing up the subject, he invited and had Waldrip to get in a hack with him where they could sit down and discuss the matter. He then proceeded to tell him that he, appellant, knew of other girls who had gotten into the same kind of trouble and had left the community where it occurred, gone a considerable distance, redeemed themselves, restored their reputation and married well and were doing well. He then proceeded to ask said Waldrip how much it would take to move him and his daughters out of the community, telling him that his (Waldrip's and his daughters') friends had made up some money for him if he wanted to use it and asked him how much it would take to move him. Said Waldrip replied that if it was a free donation made by his friends he would take whatever was made up for him if it was sufficient for him to leave on. Appellant then told him to stay where he was till another fellow came to see him, Waldrip, and he asked him if he knew Sol Ingram. Waldrip replied that he had met him a few times but did not know that he was personally acquainted with him. Directly Ingram came to him, Waldrip, where he then was, and Waldrip thinks appellant came with Ingram to him, but whether he did or not, just a little later he did so. Then they all three, appellant, Ingram and Waldrip, talked the matter over and Ingram told him in the presence of appellant that appellant had told him about the $200 and how it had been made up by his, Waldrip's and his daughters' friends. They did not tell him who had made it up, or who were their friends, but asked him if he was paid this money if he "could go and go right now." Waldrip replied that it would take him a little while to wind up his business. Ingram kept on talking and finally asked him if he "could not go right now if they would give me (him) that much and I told him I reckoned so, and Mr. Harrison (appellant) was there then I know." Ingram then asked appellant if he, appellant, could go and drive one of the conveyances to take said Waldrip and his daughters away. After some parleying appellant agreed to do so. There was then some discussion between the three as to where he was to go to take the train. Waldrip told them that Comanche would be the nearest point and they gave him to understand they didn't want him to go to Comanche to take the train. They then agreed that Mullen, another railroad station in another county, was the next nearest place. The understanding between the three was that Waldrip was to leave Comanche County that night, taking his children with him. This conference and agreement occurred about three hours before sundown. Ingram and appellant then told Waldrip to go by, get his children, take them over to his camp and that they would come on that night to his camp and take him and his children

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from his camp to Mullen. All this agreement was carried out by these persons that night. Waldrip, with his son Tom, did at once go to Tom's place, hastily have his two daughters to pack what clothes and household goods they were to take, leaving for his camp about 8 o'clock at night, his daughter Myrtle in the buggy with him and his daughter Mattie in the buggy with her brother Tom, going then some ten or twelve miles at night to his camp; that he then, after reaching his camp with his children, hastily prepared what clothing and household goods he could take in trunks and about midnight or a little later Ingram and appellant appeared at his camp, one with a buggy and the other with a hack. One of the teams was that of Wimberly. Said Ingram and Waldrip, after placing the trunks of Waldrip and his daughters in their conveyances, proceeded, after midnight, with them to the said town of Mullen, traveling all that night, reaching Mullen the next day. Appellant drove one of the conveyances part of the time that night with said Waldrip and his wife therein, and Ingram the other with the two daughters of Waldrip, Mattie and Myrtle. During the night these persons exchanged, appellant driving the buggy with the two daughters in it part of the way and Ingram the conveyances with Waldrip and his wife therein part of the way. Upon reaching Mullen they took the trunks of the parties to the depot of the railroad and the women folk to the hotel. They went to the wagon yard. After reaching Mullen and before Ingram and appellant left Mullen, returning to their homes they paid Waldrip $165 of the $200 cash they were to pay him, gave each of Waldrip's two daughters some of the money, took out $10 to pay Harrison for his time and efforts in going and driving one of the conveyances, and agreed to pay Waldrip's son for him, later, the balance of the $200 cash. It was further shown that after the conference and agreement between said Waldrip, appellant and Ingram, it was after banking hours and the banks in the town had closed, that Ingram went to one of the bankers and to some of the merchants in an attempt to raise the $200 cash, telling them that he was compelled to have $200 cash that evening. By manipulating around with two or three of them he arranged between them to raise and did raise and got $200 cash that evening. The evidence further shows that appellant and Ingram after getting said two conveyances went at night to said Waldrip's camp, arriving there, as stated above, about or after midnight; that said Wimberly was with them when they started to this camp for Waldrip and his daughters and that said Wimberly drove the hack from Gustine to Fleming a part of the way and appellant and said Ingram rode in the buggy that far together. It further shows that as agreed between them Waldrip did not tell them when they separated the next day in Mullen where he was going and take his family. They didn't know and wanted not to know. That was a part of the plan arranged between them.

Appellant has several bills of exceptions to the admission of certain

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testimony. Not one of these bills is prepared in accordance with the well established and uniformly enforced rules of this court. None of them set out the proceedings in the court below sufficiently to enable this court to know whether or not an error has been committed. Neither of them of and within themselves disclose all that is necessary to manifest the supposed error, and none of them, as stated above, comply with the rules of this court sufficiently to authorize or require it to consider them. These rules have been so frequently announced and the cases cited establishing them that we deem it unnecessary to again do so, but see sec. 857, p. 557; sec. 1123, p. 732, of White's Ann. C. C. P. Yet, while these bills are in this condition, we will state some of them and the questions attempted to be raised thereby.

The substance of the first bill in full is this: After the style, number of the cause and the court, it states that upon the trial the witness Mattie Waldrip, being on the stand testifying as a witness for the State, and having testified to having intercourse with said Wimberly and having missed her monthly sickness, was permitted, over his objections, to further testify: "After that Sam Wimberly saw me and asked me if I had missed and I told him that I had and he told me that he would get me some medicine. He got the medicine and told me how to take it and told me what it was intended to do. He told me the medicine was to bring my periods back. He told me how to take the medicine. I then took the medicine as he directed. It did not bring my periods back. Later on after that Sam saw me again and had a talk with me in reference as to whether my periods had come back on me. He asked me if my sickness had returned and I told him no. On the second trip he told me that if the medicine did not bring them on that he would get a doctor. He told me that he would get Dr. Daniels. He then brought me some medicine the second time but did not tell me who it was that fixed the medicine up. He told me how to take the second lot of medicine that he brought me. I took that medicine like he told me. He told me that it was to bring my periods around. Before he brought the second medicine he had seen me and asked me if the first medicine he gave me brought me around all right. I told him it had not." That when this testimony was offered he objected to it (a) because it related to acts, matters and conversations had between the witness and a third person in his absence, there being no proof that he knew that said Wimberly had had intercourse with said witness, or that said Wimberly had obtained such intercourse by a promise of marriage, or that he agreed to any of those things and that he could not be bound and was not responsible for any act, word or thing so done or testified to; (b) because said testimony was highly prejudicial and inflammatory and calculated to injure him before the jury and would show, if believed by the jury, that said Wimberly had seduced said witness and was then trying and attempting to produce an abortion and a miscarriage upon her, was irrelevant and immaterial. The court, in allow-

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ing the bill, did so with the explanation that appellant was being tried for the offense of an accessory to the crime of seduction which was alleged to have been committed upon the witness by said Wimberly; that the charge of the court required the jury to believe beyond a reasonable doubt that said Wimberly committed the crime of seduction on her as alleged in the indictment before appellant could be convicted on the charge against him,—the above portion of the evidence against Wimberly going to show that he had intercourse with said witness and tending, at least in part, to show he was guilty of the crime; that if said Wimberly had been on trial for seduction this evidence would have been admissible against him and being so, was competent as going to show guilt in the trial of one whose connection with that crime was that of an accessory.

The next bill makes only the same general statement of the said witness, Mattie Waldrip, being on the stand for the State and testifying, quoting nearly two typewritten pages of her testimony along the same line and to the effect that said Wimberly shortly before an abortion was produced upon her by the doctor whom Wimberly had procured and sent to her for that purpose, had ascertained from her her condition of pregnancy by him, his, Wimberly's furnishing her with medicine to bring on her monthly period and produce an abortion, failing in that that he had procured and sent to her through said Ingram a doctor who had performed an operation upon her and produced a miscarriage and abortion. To all of this testimony he made substantially the same objections as to that first above stated. In approving that bill the judge did so with the explanation and qualification that it was the State's theory that said Ingram, Wimberly and said doctor, whose name was Daniels, had all acted together as principals in producing an abortion on said witness to suppress and destroy the foetus of the child begotten by Wimberly's intercourse with her in pursuance of his seduction of her, and that this abortion was to protect him from arrest and conviction for his said crime and that such conduct on his part and all those with whom he acted as a principal tended, at least, to connect him with the seduction of said girl and tended to show he had intercourse with her and that there was evidence to support this theory. That this evidence would have been admissible against Wimberly if he had been on trial for seduction and was also admissible against one who subsequently became connected as an accessory with him in said crime.

Even if we could properly consider these bills, there is no question but that some, if not all, of this testimony would have been admissible against Wimberly if he had been on trial for seduction. As was properly held by the trial court, it was necessary under the law for the State to introduce evidence to prove that said Wimberly was guilty of seduction as charged and any legitimate evidence tending to show or establish that charge was admissible against him. Being admissible against him, it was admissible against appellant as he

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was charged as an accessory to that crime, whether appellant was present when any of the acts and dealings which occurred between the said seduced girl and Wimberly or not. We think, under all of the authorities, some, if not all of this testimony, would have been admissible against Wimberly if he had been then on trial for said charged crime of seduction.

It is our opinion, however, that even if said Wimberly had thus been on trial that the details of the operation to produce the abortion and the details of her suffering then and afterwards, would not have been admissible if any such testimony by itself had been singled out and properly objected to and the proper bills saved at the time. But that was not done in this case and bills show no such thing, but they show, as stated above, that the objections were general and to the whole of the testimony without singling out and objecting properly to that part which was inadmissible. The rule in this State is well established that under such circumstances the bill, being as stated, no reversible error is shown. Tubb v. State, 55 Tex. Crim. Rep., 606 (Peyton v. State, 35 Tex. Crim. Rep., 510); Cabral v. State, 57 Tex. Crim. Rep., 304, 122 S. W. Rep., 872; 1 Thomp. on Tri., sec. 696.

By another bill, headed the same as the ones above noted, it is stated that while the State's witness, Mr. Clark was on the stand he testified in substance that he was a member and secretary of the grand jury at the time they were investigating the matters in connection with said girl, Mattie Waldrip; that appellant was subpoenaed to come before it, did so in obedience to the subpoena and testified therein; that his testimony was taken down in writing by the witness at the time, read over to appellant and signed by him; that this written testimony of he appellant was then introduced in evidence and it is quoted in the bill and that it was introduced as original evidence, while the State was introducing its testimony before it rested; that appellant objected to it on the following grounds: (a) Because it was competent and permissible for the State to show the statement made by the defendant before the jury. (This ground has evidently been miscopied in the record. Doubtless the objection was that the evidence was incompetent and not permissible); (b) it was not then an issue before the court and not made so by the defense as to the truth of the matters inquired about by the State in the introduction of said written testimony; (c) that the grand jury had no right, under the law, to so subpoena appellant and require him to come before it and require him to testify in regard to the matter in question when they were investigating an accusation against him, and that it did not appear that said statement so made by him was voluntary, and that it did not appear before making it he was warned by the grand jury that any statement he might make would be used as evidence against him and not for him; (d) that appellant not being a witness now in this trial, it was contrary to the law for the State to be permitted to show in evidence statements and declarations so

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made before the grand jury as a part of its original evidence; (e) that it was not competent for the grand jury to make public the proceedings of that body and make public the testimony given before it by the accused. It will be noted that these various matters stated as objections were stated only and solely as objections and not as facts and were not approved by the court as facts. In allowing the bill, the court qualified and explained it by stating that appellant was not under arrest and before the grand jury and had not therefore been indicted or otherwise charged with the crime in question, or, so far as any evidence showed had not even been suspicioned of being connected therewith; that he voluntarily gave the evidence before the grand jury as any other witness and at no time and in no way claimed the privilege and asked to be excused from testifying on account of self-incrimination. In our opinion the statement, testimony and admission of a party who is on trial under such circumstances is admissible against him, there can be no question. Under the circumstances stated by the qualification of the court, and the clear lack of showing otherwise by the bill as a statement of facts in connection with the testimony of said witness Clark and the sworn testimony of the appellant, the court was clearly correct in admitting this testimony even if, as presented, we could consider this bill and the question attempted to be raised.

By three other bills appellant attempts to object to the testimony of the bankers at Gustine showing that said Ingram, late in the evening after he and Harrison had had said interview and trade with the witness Waldrip, as shown above, the efforts and statements he made to raise the $200 which they were to pay Waldrip, and the fact that he did raise and procure at the time from different persons $200. Various objections are made to this testimony but principally because appellant is not shown to have been present and his connection therewith is not shown, etc. The court, in allowing these bills, explained and qualified them by showing that said Ingram, Wimberly and appellant were shown at least substantially, if not by positive testimony, to have acted together in the matter of paying the $200 obtained by Ingram at said time to pay said Waldrip, who was a witness against Wimberly in the seduction charge and to secure his flight from the country and induce him to take with him his said daughter Mattie; that appellant's connection with the money transaction was substantially shown and as it would be admissible against Wimberly was also competent against appellant. And further, that appellant's testimony before the grand jury showed that he, Ingram and Wimberly acted together in the matter of paying the money secured to Waldrip to secure his and his daughter's flight from the country. Appellant actually assisted in carrying them away. He also states as a fact that both Ingram and Wimberly fled the country after the above facts transpired and had not up to the time of this trial been arrested on the indictments against them for their con-

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nection with the crimes of seduction, abortion, bribery, etc., against them.

Whether all of the details of the testimony of these respective witnesses should have been admitted or not, we are not called upon to say. Clearly, in our opinion, the main features of their testimony to the effect that he applied to them to procure this $200 and did procure it from them was admissible. Neither of these bills, even if considered, show any reversible error.

By another bill which is quite lengthy, as qualified and shown by it and the court, it appears that the jury after being charged and considering the case for some time, returned into open court in a body. The appellant was present, though his attorneys seem not to have been. The jury propounded to the court in writing this question: "Was it absolutely necessary for Henry Harrison (the defendant) to know that Mattie Waldrip was seduced by Wimberly?" The court in answer thereto at that time gave them this written charge: "In answer to the question propounded to me in open court in the following language, 'Was it absolutely necessary for Henry Harrison (the defendant), to know that Mattie Waldrip was seduced by Sam Wimberly?' I refer you to my main charge for a full statement of the law on that subject in connection with the law on other branches of the case. In order for the defendant to be guilty of being an accessory he must have known that the crime of seduction of Mattie Waldrip had been committed by Sam Wimberly. This issue is one for the determination of the jury and in passing upon and determining said question, you are entitled to consider all the facts and circumstances in evidence before you and it is for you to say from all such facts and circumstances in evidence before you whether he had such knowledge." The bill is too lengthy to copy in full and it is unnecessary to further state the matter therefrom.

Article 754, Code Criminal Procedure, is as follows: "The jury, after having retired, may ask further instruction of the judge touching any matter of law. For this purpose, the jury shall appear before the judge, in open court, in a body, and through their foreman shall state to the court, either verbally or in writing, the particular point of law upon which they desire further instruction; and the court shall give such instruction in writing, but no instruction shall be given, except upon the particular point on which it is asked." Some of the earlier decisions of this, and our Supreme Court when it had criminal jurisdiction, held that under the statute as it then and aforetime was that the judge was inhibited from in any event further charging the jury after he had delivered to them, and they had retired with his main charge. This rule, however, was changed on the adoption of the Revised Statutes of 1879, and this court has uniformly held that the judge may now, of his own motion, recall the jury and give them further instructions whenever he considers it necessary to do so, of course, the defendant being present. (Benavides v. State,

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31 Texas Crim. Rep., 173, and authorities therein cited.) In addition to this the statute above quoted makes it his duty to instruct the jury on the particular question they ask and while the statute says that no instruction shall be given, except upon the particular point upon which it is asked, it does not mean and has not been construed by this court to mean, that because thereof the court can not at that or any other time before the verdict correctly charge the jury on any matter thought necessary or proper by him. Neither does this statute mean that the court must give the shortest possible answer to such a question as he might have done in this case by the one word "no" or the one word "yes," but it would be proper, as was done in this case to briefly and succinctly tell the jury, correctly what to do in consideration of the question propounded by the jury and answered by the court. We think the court did not commit any reversible error in giving the special charge above quoted under the circumstances as shown in this case and as explained by him in allowing the bill.

In appellant's motion for new trial some isolated paragraphs of the court's charge are objected to and criticized. Appellant asked no special charge in the case. We have considered these matters. The court in the charge as a whole, fairly and fully submitted the questions at issue to the jury for their proper finding and, taken as a whole, appellant's objections to said paragraphs do not present any material error. The court, after submitting the question to the jury and requiring them to affirmatively believe all the facts necessary beyond a reasonable doubt before they could convict, gave a separate and distinct charge to the effect that if they had a reasonable doubt as to whether said Wimberly was guilty of the crime of seduction, as alleged in the indictment, within the meaning of the law on that subject, as given them above in the charge, or if they should have a reasonable doubt that the defendant, knowing that said Wimberly had committed said crime, concealed him or gave him any other aid in order that he might evade a trial for said offense, to acquit appellant.

The judge in explaining and qualifying one of appellant's bills, states that it is a fact that said Wimberly is a fugitive from justice and has not been arrested under the indictments found and pending against him for seduction, etc. Appellant made no motion to require the State to first try said Wimberly and in no way set up that Wimberly had been arrested or could be tried. In the absence of any motion or bill of exceptions calling upon the court to try Wimberly before appellant and in the absence of any showing that said Wimberly had been arrested, or could be tried, it comes too late in the motion for new trial to complain that Wimberly was not first tried and that appellant should not have been tried until Wimberly was tried.

The evidence was sufficient, in our opinion, to justify the verdict of the jury.

The judgment will be affirmed. *Affirmed.*

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ON REHEARING.

February 5, 1913.

PRENDERGAST, JUDGE.—Appellant presents but one question in his motion for rehearing. He contends that under certain decisions of this court and others, cited by him in his brief, that the evidence does not show or justify the jury to have found that he was an accessory under our law. His contention is tersely and accurately stated as follows:

"Appellant's contention is that he could not be guilty in this case on the facts as an accessory to the crime of seduction as charged against him, because the character of aid rendered by him as disclosed by the facts was not that direct and personal aid rendered the principal, Sam Wimberly, contemplated by our statute and as construed by the decisions of this court and of the courts of other states with similar statutes.

He cites and relies upon Caylor v. State, 44 Texas Crim. Rep., 118; Shackey v. State, 41 Texas Crim. Rep., 255; Chenault v. State, 46, Texas Crim. Rep., 351; Hargrove v. State, 63 Texas Crim. Rep., 143; Chitister v. State, 33 Texas Crim. Rep., 635; Gann v. State, 42 Texas Crim. Rep., 133; Miller v. State, 72 S. W. Rep., 996; Dent v. State, 43 Texas Crim. Rep., 126, and some New York and Georgia cases cited in A. & E. Ency. of Law, notes 2 and 3, page 267, and 12 Cyc., p. 192, sec. 3, and cases therein cited.

If this court was bound by some of the general statements in some or all of these opinions of the character of aid that it takes to constitute one an accessory after the fact, they would be in point and strongly support appellant's contention. But when each case is carefully considered, it will be noticed that the general statement of what it takes to constitute an accessory is not in point, for all such general statements and quotations of the common law text-books of what it takes to constitute an accessory, were uncalled for, and in most, if not all, instances *obiter dictum*. Take as an illustration the case of Caylor v. State, supra. The court held specifically in that case that the evidence was insufficient to sustain the conviction, and that was what was held and upon which the case was reversed. Again, take as an illustration the case of Hargrove v. State, supra. A careful examination of the case will show that what the court held in that case was "that the fact that he (the witness Williams) denied to Mr. Elkins (the county attorney) soon after the killing any knowledge of the matter and stated that appellant was at home (if appellant is guilty), is not such conduct as would render him an accessory," citing and quoting from several of the cases, supra, cited and relied upon by appellant. It is true that the opinion of Judge Harper in the Hargrove case proceeds to quote from other cases the said same general statements of what character of aid rendered to the principal was necessary to constitute one an accessory.

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Our statute defining an accessory after the fact is as follows:

"An accessory is one who, knowing that an offense has been committed, conceals the offender or gives him any other aid, in order that he may evade an arrest, or trial, or the execution of his sentence." P. C., Art. 86.

The case of Blakely v. State, 24 Texas Crim. App., 616, correctly construes our statute above, quoting it. The opinion in that case was prepared by Presiding Judge White when he and Judges Hurt and Willson constituted this court. The opinion shows that the question was carefully considered and the decision deliberately announced. That case has never been overruled by this court. It seems that no judge, from that day to this, who has ever been upon this court entertained the opinion that said decision is incorrect, unless it be Judge Henderson as indicated by him in his dissenting opinion in the Caylor case, supra. This question was thoroughly considered and discussed by this court in consultation when the Hargrove case, supra, was decided. The opinion in that case as prepared by Judge Harper at first stated that the Blakely case on this point had been overruled, but in consultation, all the judges being present and concurring, it was the opinion of the court that said Blakely case had not been overruled, but that it announced the correct doctrine and correctly construed our statute on this question; and that portion of Judge Harper's opinion as first prepared indicating otherwise was deliberately stricken out before handing it down. In order to show what was specifically decided by this court in the Blakely case, supra, we here liberally quote therefrom:

"In brief the facts proven were that, immediately after the homicide, this defendant and May went off to themselves and had a private conversation, after which May mounted a horse and rode off. Defendant Blakely then told the only other two parties who were present that they must swear before the coroner's jury to a certain state of facts which he then and there detailed, and that if they did so it would appear to said jury, and they would so find, that May was justifiable in self-defense in killing Daffin, and he would either be exonerated entirely or put upon a very light bond to answer the charge. Acting upon these suggestions, and through fear of May and defendant, the two witnesses did, at the coroner's inquest, swear, as did also Blakely, to the fabricated statement of the occurrence as devised by Blakely, and the result, as anticipated by Blakely, was that May was subsequently placed under a nominal bond, and that the grand jury for several terms of the District Court thereafter failed to indict him for the murder, and he was only indicted after it leaked out and was ascertained that the testimony given by the witnesses at the inquest was false and perjured. On May's trial under indictment for the murder, the two witnesses who had sworn on the inquest to the fabricated statement of Blakely, testified that they had sworn falsely, and developed the reasons and inducements causing them to do so. They

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also stated, as they declared truthfully, the facts attendant upon the homicide as they actually did occur, and upon this testimony, corroborated as it was by other evidence, May was convicted of murder of the first degree, and his punishment was affixed by the verdict and judgment of the court of a term of seventy-five years in the penitentiary; which judgment on appeal was afterwards affirmed by this court. (May v. State, 23 Texas Crim. App., 146.)

"It is perhaps necessary that we should further state that, after the conversation between May and defendant immediately following upon the killing, and after he had mounted a horse and ridden off as above stated, May did not appear at the coroner's inquest, nor was he seen for a day or so thereafter, until his appearance before the justice of the peace to enter into nominal bond for his appearance above mentioned.

"On this appellant Blakely's trial as accessory, the two witnesses also testified as in May's case to the facts with regard to the fabricated testimony at the inquest, and to the facts as they really occurred.

"The objections presented to this testimony are thus stated in the able brief of counsel for appellant, viz.:

" 'We submit that under our statute the "aid" given to an offender which the law denounces, is something which relates to the personal conduct of the offender after the offense, or an aid which obstructs the operation of the law in its executive branch, such as concealing the person of the offender, or advising him how to escape pursuit; furnishing him means to make his flight; putting persons in pursuit off the track, and not an aid which causes justice to slumber, or perverts its course, such as compounding with a felon, concealing the transaction either by silence or by perverting the facts so as to make that appear innocent which in truth is not.'

"Mr. Bishop says 'the true test whether one is an accessory after the fact is whether what he did was by way of personal help to his principal to elude punishment, the kind of help being unimportant.' (1 Bish. Crim. Law, 7 ed., sec. 695.) Mr. Wharton says: 'Any assistance given to one known to be a felon, in order to hinder his apprehension, trial and punishment, is sufficient, it is held, to make a man an accessory after the fact.' (1 Whart. Crim. Law, 8 ed., sec. 241.)

"We are of opinion the facts we have stated, and upon which this case rests, bring it within the purview of the general law and our statute, supra, as to accessories. Appellant, if he did not in fact conceal May until the perjured testimony was given which justified him before the inquest, certainly aided him to the extent that he was not arrested and punished for his crime until the perjury was discovered, and but for the discovery the aid which defendant attempted to give him would have proven effectual in affording him perfect and complete immunity from apprehension, trial and punishment for the murder he had committed.

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"It is true that, under the facts disclosed, defendant might have been prosecuted and convicted under our statute for subornation of perjury (Penal Code, art. 199), but this fact did not destroy nor affect his relation to the murder as an accessory; it was simply a question with the prosecution as to which of the offenses he should be tried for. We have discussed this branch of the case thus lengthily because of the fact that our statute as to accessories has never before been directly construed."

It will be noted that the court stated "we have discussed this branch of the case thus lengthily because of the fact that our statute as to accessories has never before been directly construed."

Now in the light of our statute quoted above and of the first decision of this court construing it on this point, let us see what character of aid appellant rendered to his principal, Wimberly, in this case. We do not propose to go into any lengthy statement of the evidence. It was sufficiently stated in the original opinion. We will merely briefly restate the salient point.

The evidence was sufficient to show that Wimberly had seduced the girl as charged in the indictment, and that appellant had full knowledge thereof as was required to be found by the charge of the court and was found by the jury in this case. It was further clearly shown that the grand jury of Comanche County, where the offense is charged to have been committed, was in session, having just been convened, organized, etc., and they were then specifically investigating, among others, the said charge of seduction against Wimberly, and that on Wednesday before this offense is alleged to have been committed on Thursday, had Tom Waldrip, the brother of the seduced girl, who was a material witness, before them; that in further investigation of the case the grand jury had had a subpoena issued and served upon the seduced girl, Mattie Waldrip, summoning her to appear before the grand jury as a witness in the same matter, and doubtless the grand jury, in further investigation of it, would have had her father, T. G. Waldrip, also before them as a material witness in the investigation. The evidence was sufficient to show that appellant and said Wimberly knew, or had notice, of all this. Tom Waldrip and his father were in the little town of Gustine, their trading point, on this Thursday evening, when appellant first approached T. G. Waldrip and proposed to hire him, not only to get away from Comanche County himself, but go at once and take his daughter, said Mattie Waldrip, with him, and that he did then hire T. G. Waldrip to carry out this plan, and paid, or had paid, nearly $200 in cash to so have them to leave, for no other purpose than to aid said Wimberly, and to keep said witnesses from appearing before the grand jury against Wimberly and to prevent an indictment, his arrest and a trial for the commission of said crime of seduction. Appellant and those then acting with him, entered into the particulars with Waldrip of how, and when he, appellant, and those associated with him,

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were to spirit away these witnesses that night, and have them to go "right now." Waldrip, the father and his son Tom, were to go to where the girl Mattie Waldrip and her sister were, some several miles from Gustine, take them, in the dead hours of the night, from where they were then living, some ten or twelve miles to his camp, and then, in the dead hours of the night, he the father, and the girls were to be taken away by appellant from Comanche County and secreted where they could not be found, or run out of the State, to thereby directly aid said Wimberly in preventing his indictment, and trial, and arrest. Wimberly furnished one of the teams, if he did not also furnish one of the vehicles, which appellant and the other parties interested with him, were to take these witneses away from Comanche County, and out of the jurisdiction of the Comanche County court. Wimberly went with them part of the way that night, driving one of the teams, when they were going after these witnesses. Wimberly was a party to the whole thing and did actually participate therein, and had appellant and the other party with him to take these witnesses away. Thereby appellant rendered him the aid contemplated by our statute. No greater, or more direct, personal aid could have been rendered to Wimberly by which he was to evade a trial and an arrest under an indictment charging him with the seduction of this girl. Spiriting the necessary and important witnesses out of the jurisdiction of the court, and out of the State, as the indications were that these witnesses were to leave the State is incomparably greater aid rendered directly and personally to the appellant than of merely furnishing a horse or vehicle or money to himself get away. Even if he could have or should have gotten out of the State if an indictment had been found against him, he could have been arrested anywhere in the United States, and perhaps other nations, extradited, and brought back to Comanche County for trial; but if appellant had spirited the witnesses out of the State there is no way known under our law whereby such witnesses could legally have been returned to the jurisdiction of the court in Comanche County, or their evidence had, to find an indictment, and Wimberly be arrested and tried.

So that we hold that under our statute anyone who, knowing that an offense has been committed, in order to prevent the offender from being indicted, and arrested or tried, spirits away or hires the material witnesses to leave so that they cannot be had before the grand jury or trial court, this is such aid personally and directly to the offender as would make such person an accessory, all the other requisites being shown.

We further hold that the construction of our accessory statute in the Blakely case is a correct construction thereof and that all of the other general statements in the decisions of this court indicating otherwise are hereby expressly disapproved.

The motion is overruled. *Overruled.*

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Dick Galloway v. State.

No. 2248. Decided February 5, 1913.

Local Option—Law in Force.

Where, upon trial of a violation of the local option law, there was no evidence that local option was in force, and the defendant requested a charge to find defendant not guilty on this ground, which was refused, the same was reversible error.

Appeal from the County Court of Newton. Tried below before the Hon. G. C. Colson.

Appeal from a conviction of a violation of the local option law; penalty, a fine of $100 and sixty days confinement in the county jail.

The opinion states the case.

Forse & Wigley, for appellant.—On question of law in force: Akin v. State, 14 Texas Crim. App., 142; Tyrell v. State, 44 S. W. Rep., 159; Ellis v. State, 59 Texas Crim. Rep., 630, 130 S. W. Rep., 170.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, Judge.—Appellant was prosecuted and convicted of selling intoxicating liquors in Newton County in violation of the prohibition law.

We have read the record carefully and if there was any proof offered that local option is in force in Newton County they failed to indicate it in the record now before us.

The statement of facts contains no mention of whether or not local option was ever adopted in Newton County. Counsel presented a special charge instructing the jury that as no proof had been offered showing that local option was in force in that county, to return a verdict of not guilty, and if there was no more evidence adduced on the trial than is shown by this record, this charge should have been given.

Because there is no evidence showing that local option is in force in Newton County, the judgment is reversed and the cause is remanded.

Reversed and remanded.

P. E. LaFell v. State.

No. 2251. Decided February 5, 1913.

1.—Theft of Horse—Insufficiency of Evidence.

Where, upon trial of theft of a horse, the evidence was insufficient to support the conviction, the verdict of guilty cannot be sustained.

2.—Same—Charge of Court—Principals.

Where, upon trial of theft of a horse, the evidence did not show that the defendant was connected as principal with the original taking, and the

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charge of the court did not require the presence of the defendant at the time of such taking, the same was reversible error.

3.—Same—Charge of Court—Circumstantial Evidence—Alibi.

Where, upon trial of theft of a horse, the defensive theory was an alibi and the inculpatory evidence was circumstantial and there was also evidence that defendant might be guilty of an accomplice or accessory, the court's charge on principals that defendant would be guilty as principal, although he was not present, etc., was reversible error.

4.—Same—Charge of Court—Converse Proposition.

Where the court charged on the law of principals, and there was evidence that defendant was not present at the original taking, the converse proposition should also have been given to the jury. Following Jackson v. State, 20 Texas Crim. App., 190, and other cases.

5.—Same—Evidence—Flight.

Where, upon trial of theft of a horse, the State introduced evidence tending to show the flight of the defendant, it was error not to permit the defendant to show that he voluntarily returned and did not attempt to flee.

6.—Same—Continuance.

Where defendant's first application for continuance showed due diligence and material testimony for his defense, the same should have been granted.

7.—Same—Evidence—Grand Jury—Warning.

Where the written statement of defendant before the grand jury did not show that he was duly warned, the same was inadmissible in evidence on his trial, and an independent statement of another could not be used against him to supply the defect in defendant's statements or confessions.

Appeal from the District Court of Brewster. Tried below before the Hon. A. M. Walthall, sitting in exchange.

Appeal from a conviction of theft of a horse; penalty, five years imprisonment in the penitentiary.

The opinion states the case.

John T. Hill, for appellant.—On question of overruling motion for continuance: Ware v. State, 49 Texas Crim. Rep., 413, 92 S. W. Rep., 1093; Roquemore v. State, 54 Texas Crim. Rep., 592, 114 S. W. Rep., 140; Thomas v. State, Texas Crim. Rep., 329, 101 S. W. Rep., 797; Keys v. State, 60 Texas Crim. Rep., 279, 131 S. W. Rep., 1068; Phillips v. State, 50 Texas Crim. Rep., 127, 94 S. W. Rep. 1051.

On question of insufficiency of the evidence: Banks v. State, 56 Texas Crim. Rep., 262, 119 S. W. Rep., 847.

On question of the court's charge on principals: Davis v. State, 55 Texas Crim. Rep., 495, 117 S. W. Rep., 159; O'Quinn v. State, 55 Texas Crim. Rep., 18, 115 S. W. Rep., 39.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was convicted of horse theft, his punishment being assessed at five years confinement in the penitentiary.

The case is one of circumstantial evidence. The owner of the alleged stolen animal testified it was a mare and was in his pasture

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about twelve miles west of Alpine. The last time he saw the animal was on the 4th of January. That on the 12th he discovered she and three mules had disappeared from his pasture. That later these animals were recovered at or near Carlsbad in the State of New Mexico. The evidence further shows that appellant and Cleveland were in Alpine, and left there on the 10th of January. That on the 13th they were in Toyah, Reeves County, about eighty miles distant from Alpine. An attorney at Toyah testified that Cleveland and appellant appeared at his office on the morning of the 13th and requested that he draw up a bill of sale for some horses and mules; that he did so, including nine head. That this bill of sale was signed by a man named White. By this bill of sale the title to the property was transferred to appellant and Cleveland. Among these animals was the mare in question. The sheriff of Brewster County where Alpine is situated and from which the mare is claimed to have been taken, followed appellant and Cleveland to or found them at Carlsbad, New Mexico, and recovered the stock and brought them back. A statement in writing made by appellant was also introduced which corroborated the attorney's evidence in regard to the purchase of the animals. So it will be seen, and the record manifests beyond question, that appellant was not shown to have been present at the time and place that the animals were taken. He bought the animals at Toyah some eighty or ninety miles from where they were said to have been taken from the pasture, and the evidence is reasonably sufficient to show that he went in possession of the horses at the time he bought them at Toyah. When arrested or notified of the fact that he was charged with taking the animals he made the statement that he bought the animals from White. This was introduced by the State. So we have a case purely of circumstantial evidence. The first connection of appellant with the animals, so far as the record is concerned, by any fact was eighty or ninety miles from where the animals were stolen. The State contends that the evidence was sufficient to warrant the jury in concluding that the animals were stolen in pursuance of a conspiracy between appellant, White and Cleveland, but that is but one side of the case even if the facts are sufficient to suggest that question. The facts as introduced show that he was in possession probably at Toyah first. Whether he was in possession before that time or not is a matter purely of conjecture. If he was present at the taking it can only be reached by inference. No witness so testified.

In this condition of the evidence the court charged the jury on the law of principals as follows: "When an offense has been actually committed by one or more persons the true criterion for determining who are principals is, did the parties act together in the commission of the offense; was the act done in pursuance of a previously formed design in which the minds of all united and concurred. If so, then the law is that all are alike guilty, provided the offense was actually

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committed during the existence and in the execution of the common design and intent of all whether in point of fact all were actually, bodily present on the ground when the offense was actually committed or not." Exception was taken to this charge and a special requested instruction asked to the effect that before defendant could be guilty as a principal and convicted under this indictment, the State must show beyond a reasonable doubt that he was connected with the original taking as a principal, and the fact that he may have received the property after it was stolen, would not constitute him a principal unless it was further shown that he was present at the time and place of the taking. The court's charge was wrong, and the court was also in error in refusing the requested instruction. The charge as quoted above and given by the court is reversible error in felony cases, especially so where the defensive theory was alibi as was shown by the statement of the defendant introduced against him on the trial. Such charge is also wrong where the inculpatory evidence is circumstantial and consists of acts occurring either before or after the commission of the offense or both, or where there is evidence that defendant, if guilty at all, would only be guilty or might be guilty as an accomplice or accessory, either or both. Dawson v. State, 38 Texas Crim. Rep., 50; Yates v. State, 42 S. W. Rep., 296; Bell v. State, 39 Texas Crim. Rep., 677; Joy v. State, 41 Texas Crim. Rep., 46; Criner v. State, 41 Texas Crim. Rep., 290; Walton v. State, 41 Texas Crim. Rep., 454; Steed v. State, 43 Texas Crim. Rep., 567; McAlister v. State, 45 Texas Crim. Rep., 258; McDonald v. State, 46 Texas Crim. Rep., 4; Barnett v. State, 46 Texas Crim. Rep., 459; Eddens v. State, 47 Texas Crim. Rep., 529; McCulloch v. State, 71 S. W. Rep., 278; Armstead v. State, 48 Texas Crim. Rep., 304; Holmes v. State, 49 Texas Crim. Rep., 348; Fruger v. State, 50 Texas Crim. Rep., 621; Davis v. State, 55 Texas Crim. Rep., 495; O'Quinn v. State, 55 Texas Crim. Rep., 18; Jones v. State, 57 Texas Crim. Rep., 144; Clark v. State, 60 Texas Crim. Rep., 173, 131 S. W. Rep., 556. See Branch's Crim. Law, sec. 682, for many authorities collated.

It is also a rule of law that where the court charges a conviction on the theory that the accused was a principal, the converse of the proposition should also be given, that is, that if another did in fact commit the offense and defendant did not aid and encourage him in the commission and was not present, he would not be a principal. Jackson v. State, 20 Texas Crim. App., 190; McMahon v. State, 46 Texas Crim. Rep., 540; Monroe v. State, 47 Texas Crim. Rep., 59; Wood v. State, 28 Texas Crim. App., 14; Cecil v. State, 44 Texas Crim. Rep., 450; Goodwin v. State, 58 Texas Crim. Rep., 496.

During the trial of the case, appellant, in connection with his arrest and what occurred at Carlsbad, New Mexico, proposed and offered to show that he voluntarily returned to Texas from the State of New Mexico. This was refused by the court. We are of the opinion the court was in error in refusing this testimony. The State had

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introduced evidence that he had gone to New Mexico and the sheriff had gone there and found him with the horses and arrested him for it. Under this view of the case appellant had the legal right to show that he voluntarily returned to Texas, and that inasmuch as the State introduced these facts against him, tending to show he was fleeing the country with the stolen horses, this testimony would tend to explain that he was not guilty of the theft as he claimed he was not; it would have tended also to aid him in his view of the case that he had bought the animals and had no occasion to be afraid of the result of his return to Texas. For authorities supporting this proposition see Branch's Criminal Law, sec. 350.

When the case was called for trial appellant filed an application for a continuance. It was his first application. By the testimony of absent witnesses he proposed to show that he was in Alpine at the time the mare is said to have been stolen, and had no opportunity to go eleven or twelve miles to the pasture and take the mare, and by two other witnesses, that they saw him while he was traveling the road from Alpine to Toyah, and that he was not then in possession of the mare, or any of the other alleged stolen animals. Without going into a detailed statement of these matters, we are of opinion the testimony was material. The diligence seems to have been sufficient, and it was his first application. Appellant's theory was that he was not present at the taking of the animals; that his first connection with the animals was at Toyah. The State had a statement from him to that effect which they introduced. In aid of his theory of it these witnesses, if they would testify as indicated in the application for continuance, would have shown that they saw him between the two points, Alpine and Toyah, without any of these alleged stolen animals. It is not discussed further, because upon another trial the witnesses may be present, or if not present, it will be a second application, and the record may then be presented from an entirely different standpoint.

Another matter is suggested for reversal, viz.: the introduction of appellant's statement before the grand jury. He was under arrest and carried before the grand jury. The statement begins: "My name is P. E. LaFell. I live in Alpine. I came here from Los Angeles, California; have been here about three months. I left Alpine about the 10th day of January in company with Mr. A. S. Cleveland. We left horseback and went across country to Pecos; did not stop in Pecos and went to Toyah. I knew George White slightly; met him first when we went to Toyah which was on the 13th day of January. I had about $500 when I left Alpine; did not keep my money in bank; kept it in my pocket," etc. This covers something like three pages of the record, and does not show anywhere on the face of his statement that he was warned or who warned him, or to whom the statement was made. There is a separate document signed by C. A. Brown, foreman of the grand jury, to the effect that appellant was

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brought before the grand jury and was warned by the district attorney, and that appellant made the statement attached to Brown's written statement after being warned, and after he was warned that the district attorney reduced his statement to writing, and at the conclusion of said statement the same was read by him to appellant and he signed it. Brown signed this statement on the 13th day of February, 1912, but this statement of Brown's is an independent statement and not appellant's. There is no where in the statement made by appellant any showing that he was warned or that he made the statement. It is simply a statement written down by the district attorney and signed by appellant. The statement in writing made by Mr. Brown, foreman of the grand jury, was not part of appellant's statement; it is an independent matter and cannot be used against defendant to supply the defects in the statement made by him. A warning may be properly shown by evidence, when evidence is admissible for that purpose. Exception was taken to all this. These matters set forth in the bill of exceptions and motion for new trial.

For the errors indicated the judgment is reversed and the cause is remanded.

Reversed and remanded.

B. A. Lester v. State.

No. 2255. Decided February 5, 1913.

1.—Occupation—Selling Intoxicating Liquors—Local Option—Insufficiency of the Evidence—Charge of Court.

Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the evidence did not show that the defendant sold such liquors to the parties alleged in the indictment, and did not show that local option was in force, and the court did not charge the law of the case, the conviction could not be sustained.

2.—Same—Evidence—Law in Force.

Where, upon trial of pursuing the occupation of selling intoxicating liquors, in local option territory, it was not shown that local option was in force, the mere fact that the State offered such testimony, but the record did not show that it was introduced, the same was insufficient.

Appeal from the District Court of Wichita. Tried below before the Hon. P. A. Martin.

Appeal from a conviction of unlawfully pursuing the occupation of selling intoxicating liquors in local option territory; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Mathis & Kay, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

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DAVIDSON, PRESIDING JUDGE.—The indictment charges that appellant in justice precinct No. 4, followed the occupation of selling intoxicants while local option was in effect, in this: that on or about the 10th day of July, 1912, and anterior to the presentment of the indictment, appellant, in justice precinct No. 4, Wichita County, did then and there engage in and pursue the occupation of selling intoxicating liquors in violation of said law, which law was then and there in full force and effect in said justice precinct No. 4, Wichita County, Texas, and that the said Lester, did then and there on or about the said date, to-wit: July 10th, A. D. 1912, make two different sales of intoxicating liquor, one to W. A. Gault, one to E. D. Williams, and one to W. E. Tipton and on or about the said date did make different and other sales of intoxicating liquor to divers persons, in violation of said law, whose names to the grand jurors are unknown and did during the months of June and July, 1912, and anterior to the presentment and filing of this indictment, make more, at least, than two sales of intoxicating liquor in violation of said law, which was then and there in full force and effect in said justice precinct No. 4, Wichita County, Texas, against the peace and dignity of the State. The jury gave appellant two years imprisonment in the penitentiary.

It was shown by Reid that he was county clerk and was custodian of the records of the County Court and had the records with him. It was also proved that at Electra there was a place known as "Less' Place." Terry testified that he had seen the defendant about there and knew the fact that whisky and beer had been sold in that place within the last twelve months. Said that he did not see appellant about the place at all at the time he bought beer; all that he knew about the place was that it was called "Less' Cold Drinks." That all he knew about defendant was that when he met him on the street he had been pointed out as Mr. Lester; that that was all he knew about him. Another witness testified that he had hauled a couple of barrels of something that he supposed to be beer; these were directed to defendant; he had only been to the place twice. Tipton, one of the alleged purchasers, testified that he knew defendant, had seen him in Electra and in the courthouse, and in jail; that these were the only times he had ever seen him; that he saw him at his place of business in Electra which had a sign over it, "Less' Place;" that he went in there and bought three bottles of beer, that Charlie Roberson was with him. He does not fix the time of this purchase; that he did not buy this beer from appellant, but bought it from another man who waited on them and received the money; that he saw appellant sitting over against the wall at the time indicated, but did not see him do anything. Roberson testified that he was up at "Less' Place," did not know when it was, but about six or eight weeks before he was testifying; that he and Tipton and appellant and "another big guy" were present, but he didn't know who the "big guy" was.

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He says he didn't recollect what the conversation was about but they got some beer. He and Tipton got the beer. Appellant was then present,—at the time he got the beer. They were discussing an election for constable; he did not think there was any sign in front of the place. He says "the big fellow," whom he did not know and was a stranger to him, sold him the beer; that "Less" was sitting "honkered" down by the side of the wall close to the door during this time; that he did not know the name of the big fellow, or "guy" as he called him, and had never seen him since. Another witness, LaCroix, says he bought a bottle of beer in there but this was not from the defendant. He never saw defendant sell any beer in there. F. D. Williams testified that he was running a dray wagon. He says he "hauled one jag there;" "it was for another man; I do not know who it was got me to haul it. I carried it to Mr. Lester's place. There was not anyone there and I just put it off there. I do not know what it was; I just hauled a barrel. It looked something like a flour barrel, or something like that; I do not know just what." He did not notice any labels on the barrel he was hauling. He says, "this jag I hauled, Mr. Lester never paid me for it. One of the draymen paid me for it." He says he bought one pint bottle of beer from appellant. Tipton said the brand of beer he bought was Falstaff. This, he testified on recall, and that it was intoxicating. The statement of facts makes this recitation: "Plaintiff offered in evidence certified copies of orders showing that prohibition was in force in the justice precinct of Electra, Wichita County, Texas."

The court charged the jury, among other things, in applying the law to the case that if they found and believed from the evidence beyond a reasonable doubt, that appellant engaged in the business of selling intoxicating liquors in precinct No. 4 of Wichita County, Texas, at any time during the year 1912, anterior to the first day of August, 1912, and that if they should find beyond a reasonable doubt. that he in person, or by agent or employe or by partner, while engaged in such business, made as many as two different sales of such intoxicating liquors to persons appellant is charged to have made such sales to, within three years next before the filing of the indictment, then they would find him guilty. Appellant excepted to this charge and asked the following requested charge: "You are instructed to find a verdict of 'not guilty' in this case unless you find and believe from the evidence beyond a reasonable doubt that the defendant was engaged in the business of selling intoxicating liquors in justice precinct No. 4, Wichita County, Texas, at the times mentioned in the indictment; and that the defendant, while engaged in said business, sold, either in person or through some other person, as his agent, employe, or partner, at least two different sales to one or more of the parties named in the indictment." This was refused and the appellant excepted. He asked also a charge that before they could convict they must find that appellant followed the business men-

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tioned and made at least two sales of intoxicating liquors, as the making of sales is defined in the main charge, within three years next proceeding the date of the filing of the indictment, "and that in this connection you cannot consider the sale shown to have been made to Williams of one pint of beer as being one of the two sales necessary to convict." These charges were refused.

It is contended in the motion for new trial that the judgment is erroneous and against the evidence in that it is not shown that appellant, either in person or through anyone else, made as many as two separate and different sales and that he was not shown to have had any connection with the persons whom the testimony shows made the sales, except one, and the State did not show that the persons making the sales were agents, or employes, etc., of appellant. And other attacks are made upon the sufficiency of the evidence, because it failed to prove a case against appellant, both as to his following the business, or making the necessary sales. We are of opinion that the judgment ought to be reversed. The State did not place either Gault or E. D. Williams on the stand to testify in the case. These were two of the parties set out in the indictment as having been purchasers. There was a witness by the name of Williams offered, but this was another Williams and not E. D. Williams,—it was F. D. Williams. The witnesses did not fix the time of the sales as about that alleged in the indictment. The statement of facts, if it recites the testimony correctly, and we must be guided by that inasmuch as it is approved by the court, does not show any sale to but one of those named in the indictment, to-wit: Tipton. We are under the impression that the attack on the court's charge which instructed the jury if they should find beyond a reasonable doubt that if appellant by agent, employe or partner, while engaged in such business, if he was so engaged, etc., was error. The evidence does not show that he was a partner of any of the parties who sold, or that he ever had any connection with the men who sold the stuff to Tipton, the only man alleged in the indictment, who purchased at the place mentioned. This charge is too indefinite. A clearer charge should have been given on the doctrine of principals, if appellant was to be held a principal. He might have made one sale in the place himself, without carrying on the business, or being in any way connected with the ownership of it and even if he was aiding or abetting the owner of the place to sell, one sale would not be sufficient.

It is also contended that it was not shown that local option or prohibition was in effect, and especially for three years prior to the filing of the indictment. It may be that appellant was guilty, but the record ought to be clearer showing his guilt and his connection with the matter and it ought to be clearer that the local option law was in effect. The mere fact that the State offered in evidence certified copies of the orders showing local option in effect is not sufficient under all the authorities in this State, so far as we are aware. It

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must be shown that the local option law was in effect at the time of the alleged offense. The mere statement that the evidence was offered is not sufficient to show that it was introduced. The authorities are singularly in harmony on this proposition. Many bills of exceptions have been held insufficient by this court because they failed to state that the evidence offered was in fact introduced in evidence. See Burke v. State, 25 Texas Crim. App., 172; Jackson v. State, 28 Texas Crim. App., 143; Wilson v. State, 32 Texas Crim. Rep., 22; Thompson v. State, 33 Texas Crim. Rep., 17; Rodgers v. State, 34 Texas Crim. Rep., 612; Isaacs v. State, 36 Texas Crim. Rep., 505; Stroube v. State, 40 Texas Crim. Rep., 581; Hutcherson v. State, 35 S. W. Rep., 375; Lyon v. State, 61 S. W. Rep., 126; Moseley v. State, 43 Texas Crim. Rep., 559; Jacobs v. State, 28 Texas Crim. App., 79; Smith v. State, 32 S. W. Rep., 696. In making up a statement of facts it should be made to show, if the evidence was introduced, that it was introduced. The offer of testimony is one thing and the introduction of testimony is quite a different thing.

This judgment is ordered to be reversed and the cause remanded.

Reversed and remanded.

J. S. FRENCH v. STATE.

No. 2253. Decided February 5, 1913.

Stock Law—Recognizance—Appeal Bond.

Where, upon appeal from a conviction of the stock law, the record showed that appellant did not enter into a recognizance during term time, but after adjournment entered into an appeal bond, this court has no jurisdiction.

Appeal from the County Court of Jones. Tried below before the Hon. Joe C. Randel.

Appeal from a conviction of violating the stock law; penalty, a fine of $5.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—The term of court at which appellant was tried adjourned September 28, 1912. He did not enter into a recognizance during term time, but after the adjournment of court undertook to perfect his appeal by entering into an appeal bond. This being a conviction for a misdemeanor, the appeal bond confers no jurisdiction on this court. Herron v. State, 27 Texas, 377; Jones v. State, 1 Texas Crim. App., 485; Arnold v. State, 3 Texas Crim. App., 437.

The appeal is dismissed.

Dismissed.

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TOM WALLS V. STATE.

No. 1875. Decided November 20, 1912.

Rehearing Denied February 5, 1913.

1.—Seduction—Sufficiency of the Evidence—Conflict of Testimony.

Where, upon trial of seduction, the evidence was sufficient to sustain the conviction, although conflicting, there was no error.

2.—Same—Indictment.

Where, upon trial of seduction, the indictment followed approved precedent, there was no error.

3.—Same—Continuance—Want of Diligence—Second Application.

Where defendant's motion for continuance showed a want of diligence, and did not state that the absent testimony could not be procured from any other source, there was no error in overruling same.

4.—Same—Evidence—Other Acts of Intercourse.

It is the settled law of this State now that the State is not confined to the first act of sexual intercourse in seduction cases, but that subsequent acts of intercourse may be shown. Following Battles v. State, 63 Texas Crim. Rep., 147, and other cases.

5.—Same—Argument of Counsel—Bills of Exception.

Where the bills of exception did not point out the error and no written charges were requested to the argument of State's counsel, there was no error. Following Clayton v. State, recently decided.

6.—Same—Repetition of Prosecutrix.

Upon trial of seduction, the court indicated to defendant that he could prove the character of prosecutrix by general reputation, etc., and the record showed that the witnesses would not have testified to specific acts of sexual intercourse between prosecutrix and third parties, there was no error.

7.—Same—Charge of Court—Credibility of Prosecutrix.

Where, upon trial of seduction, the court properly submitted the law on the facts and instructed the jury that they could consider the subsequent acts of prosecutrix as to her credibility, there was no error.

8.—Same—Charge of Court—Practice on Appeal—Sufficiency of the Evidence.

Where, upon trial of seduction, the evidence sustained the conviction under a full and fair charge of the court, there was no error, and general objections to the charge of the court cannot be considered.

Appeal from the District Court of Hall. Tried below before the Hon. S. P. Huff.

Appeal from a conviction of seduction; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

H. B. White and *Robert J. Thorne,* for appellant.—On question of refusing motion for continuance: Kelly v. State, 24 S. W. Rep., 295.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—The appellant was indicted and convicted of seduction. The jury fixed the lowest penalty therefor.

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Among other grounds appellant complains that the evidence is insufficient to sustain the verdict. It would serve no useful purpose to state the evidence in this case. Suffice it to say that from the State's side it is amply sufficient, if believed by the jury, to sustain the conviction. That there were contradictions by the defendant's witnesses of the State's, and more or less impeaching testimony, does not change the rule. That occurs in a great many cases brought before us. These matters were all for the lower court and the jury. We cannot usurp their power or authority, nor take the decision of such questions from them. Kerse v. State, Love v. State, and Duckett v. State, recently decided but not yet reported. Many other cases might be cited.

The indictment in this case follows strictly the statute and the approved forms by Judges Wilson and White, and Bishop, and appellant's motion to quash it was correctly overruled.

Appellant made a motion for a second continuance of this case on account of the absence of three witnesses. The bill, as qualified by the Judge, shows that at the June Term, 1911, he continued the case on the application of the appellant, because of the absence of two, if not all three, of these witnesses and that no diligence whatever was thereafter used to procure their attendance on this trial. The application and bill, as allowed by the court, show no such diligence as would show error in refusing the continuance. Besides, the application did not state that the evidence of the absent witnesses could not be procured from any other source.

By three other bills appellant complains that the court permitted the State to prove other acts of intercourse other than the first testified to by the State's witness. These bills were qualified by the court, —some of them, in fact, not approved by the court, others stating that certain objections claimed to have been made were not made and stating what were made. It is the settled law of this State now that the State is not confined to the first act of intercourse in cases of this character, but that subsequent acts of intercourse to the first one at and before which the promise of marriage is made, may be shown. Hinman v. State, 59 Texas Crim. Rep., 29; Murphy v. State, 65 Texas Crim. Rep., 55; 143 S. W. Rep., 616; Battles v. State 63 Texas Crim. Rep., 147, 140 S. W. Rep., 783. It is needless to cite other cases.

Appellant has other bills of exceptions complaining of brief statements of what the prosecuting attorney said in objecting to questions and such like matters. The bills are very meager and do not show the occasion for such remarks, nor that they were improperly made under the circumstances. We are of the opinion that no reversible error is presented by any of these matters, even if not qualified by the court, but as qualified by the court, no error whatever is shown. The same applies to the objection of his meager statement of what the State's attorney said in the argument in the case before the jury. Besides, no written charges were requested by appellant to disregard

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any such argument. Clayton v. State, 67 Texas Crim. Rep., 311; 149 S. W. Rep., 119.

By other bills appellant complains that the court refused to permit him to prove by certain witnesses that such witness had heard that others had accused the prosecutrix of improper relations with other parties than the defendant and that it was talked generally throughout the community that another, other than appellant, was responsible for her condition and that another was generally accused of this girl's condition and that such other had left the country on that account. This testimony was objected to as hearsay. The court indicated to appellant that he could prove the character of the prosecutrix by general reputation or by specific acts. The court in qualifying these bills shows that the witness would not have testified as claimed by appellant but did testify the reverse. These bills show no error, especially as qualified and explained by the court. Parks v. State, 35 Texas Crim. Rep., 378; Carter v. State, 59 Texas Crim. Rep., 73. Nor does the 10th bill, as qualified by the court show any error, or any such objection to testimony as to show any error.

The court did not err in the 6th paragraph of the charge in telling the jury in effect, that if appellant had seduced and had carnal intercourse with the prosecutrix by virtue of a promise of marriage and at that time she was a chaste woman and had not previously had intercourse with any other, the fact, if it was a fact, that she afterwards had intercourse with others, would be no justification, or ground of defense to appellant. In the charge he further tells the jury that they could consider her subsequent acts or conduct to effect her credibility and the weight to be given to her testimony. This charge was proper under the circumstances of this case. The jury gave the appellant the lowest penalty under the law.

The other complaints of the charge of the court are so general as to point out no error whatever, or authorize this court to consider such grounds, and this applies to his assignments of the refusal of his certain charges, the grounds merely being that the court erred in refusing to give a certain charge mentioning it by number. Besides this, the charge of the court was full and fair to appellant, submitting everything in his favor as favorable if not more so, than authorized by law, and in the submission of the case to the jury for a finding, required them to find everything necessary and proper to be found against him, beyond a reasonable doubt, before they were authorized to convict him.

Notwithstanding the evidence and record in this case is voluminous, we have given it a careful and thorough study and investigation. The evidence was amply sufficient, if believed by the jury as it was, to sustain a conviction and no reversible error whatever is pointed out. The judgment is affirmed. *Affirmed.*

[Rehearing denied February 5, 1913.—Reported.]

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JOSEPH VALIGURA v. STATE.

No. 2265. Decided February 5, 1913.

1.—Carrying Pistol—Sufficiency of the Evidence.

Where, upon trial of unlawfully carrying a pistol, the evidence sustained the conviction, there was no error.

2.—Same—Jury and Jury Law—Name of Juror—Idem Sonans.

Where defendant contended that the juror's name to whom he objected was Andres and not Andrews, and there was no question as to his identity, there was no error in overruling the objection; besides, the names are idem sonans. Following Gentry v. State, 62 Texas Crim. Rep., 497, and other cases.

3.—Same—Indictment—Date of Offense.

Where defendant objected to the testimony as to the date of the offense because the indictment showed the figures 190 instead of "1911," but the indictment really showed in fact the figures to be "1911," there was no error in overruling the objection.

4.—Same—Hearsay Evidence—Harmless Error.

Where the court admitted in evidence hearsay evidence over the objections of the defendant, the same was improper but harmless error, inasmuch as the defendant and other witnesses testified to the same thing.

5.—Same—Evidence—Credibility of Witness—Harmless Error.

Where the defendant attacked the credibility of a State's witness by attempting to show that she met defendant clandestinely, there was no error in permitting her to show that defendant claimed to her to be a single man, etc.; besides, if error, it was harmless.

Appeal from the County Court of Lavaca. Tried below before the Hon. P. H. Green.

Appeal from a conviction of unlawfully carrying a pistol; penalty, a fine of $100.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—Appellant was convicted for unlawfully carrying a pistol and fined $100.

The evidence was amply sufficient to sustain the verdict. It also would have justified the jury to have acquitted appellant. Under such circumstances the jury, being the judges of the credibility of the witnesses and the weight to be given to their testimony, this court can not disturb the verdict.

The court did not err in overruling appellant's challenge to the juror, Theodore Andres. Appellant's bill shows that "Andres" was the correct spelling of the juror's name. It was spelled by the jury commissioners and he was summoned under the name of "Theodore Andrews" but he is identified as the man who was selected by the

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jury commissioners, summoned as such juror and attended. It was shown that he got mail addressed to him under the name of "Theodore Andrews" and that those who did not know him well and were but slightly acquainted with him called him "Andrews." The appellant's challenge to the juror was because the correct spelling of his name was "Andres" and not "Andrews." There was no question as to the identity of the man, and the court, in allowing the bill, stated that the juror was a regular juror for the week, had been drawn by the jury commission, and summoned by the sheriff under the name of "Theodore Andrews." The bill does not show the juror served. Andres and Andrews are *idem sonans*. Gentry v. State, 62 Texas Crim. Rep. 497; Fenny id. 585; Smith v. State, 63 Texas Crim. 183.

The offense is charged, as shown by the indictment, to have been committed on or about October 15, A. D. 1911. The indictment copied in the record clearly so shows. When one of the State's witnesses was on the stand and asked about the charge against appellant and to state the date when, if at all, he saw appellant carrying a pistol, he testified that it was about the first of October, A. D. 1911. The appellant objected because of the uncertainty as to the date charged in the indictment, apparently claiming that the indictment did not allege that it was in 1911. He thereupon introduced the clerk of the court who testified that the indictment was on a printed form and had the figures "190" printed in it, then explained that the two figures "11" were written apparently one through the edge of the "9" and the other through the edge of the "0." The court, in qualifying the bill, stated that the clerk testified that the figures so read made 1911. The court did not err in permitting the witness to testify over appellant's objection.

It was improper for the court to permit Joe Chromcak to testify over his objections, that his wife had told him that Alzbeta Kastner had told her the night the offense is charged to have been committed, that she had gone or was going down the road to meet the defendant. This was hearsay, but it was not reversible error, because the appellant himself in substance, and all the other witnesses, both for him and against him, testified, that she did go and meet him at his request.

Appellant introduced proof tending to show that the girl Alzbeta Kastner, whom he had to meet him the night he is charged with carrying a pistol, and who testified for the State that appellant then had a pistol with him, showed it to her and told her that he had fired it off three times that night, was a prostitute. The State introduced proof tending to show the contrary,—that the girl was all right. The testimony shows that the appellant also attacked this girl's testimony and attempted to reflect upon her by showing that she met appellant out in the road at night on this occasion. It was also shown that he had called upon the girl before this time. The court, therefore, did not err in permitting her to testify under the circumstances that the defendant had before then told her he was a single man but that

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she had later learned that he was a married man. Even if it had been error to permit this testimony it could not be reversible error.

There being no reversible error the judgment will be affirmed.

Affirmed.

A. J. POTEET V. STATE.

No. 2230. Decided February 5, 1913.

Rehearing denied February 26, 1913.

1.—Embezzlement—Indictment—Description of Money.

Where, upon trial of embezzlement, the indictment followed approved precedent and properly described the money embezzled, there was no error in overruling a motion to quash.

2.—Same—Charge of Court—Venue.

Where, upon trial of embezzlement, the court's charge specifically required the jury to believe beyond a reasonable doubt that the defendant fraudulently embezzled the alleged money in the county of the prosecution, the same was sufficient.

3.—Same—Jurisdiction—Statutes Construed.

Under Article 251, Code Criminal Procedure, where the defendant received the alleged embezzled money in the county of the prosecution, the jurisdiction of the court was sustained.

4.—Same—Case Stated—Jurisdiction—Venue.

Where, upon trial of embezzlement, the evidence showed that by agreement between the defendant and the prosecutor, the defendant drew on the prosecutor for the amount of the alleged embezzled money through a bank in the county of the prosecution to which the prosecutor paid the money after receiving a letter from the defendant directing him to do so, and that in fact and in law the defendant received said money in the county of the prosecution, although he was at the time in another county, the jurisdiction of the offense properly attached to the county of the prosecution.

5.—Same—Partnership—Charge of Court.

Where, upon trial of embezzlement, there was slight evidence of partnership between defendant and prosecutor and the court submitted the issue to the jury, who found adversely to defendant thereon, there was no error.

6.—Same—Charge of Court—Practice on Appeal.

Where no reason is given in the requested charge itself why it should have been submitted and no such reason was set up in the motion for new trial, the same will not be considered on appeal; besides, the evidence did not raise the issue submitted in the requested charge.

7.—Same—Misconduct of Jury—Presumption.

Where the question of the misconduct of the jury was examined into by the trial court and decided adversely to defendant, and there appeared in the record on appeal no evidence, the presumption is that the trial court correctly ruled thereon.

Appeal from the District Court of Atascosa. Tried below before the Hon. E. A. Stevens.

Appeal from a conviction of embezzlement; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

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W. W. Walling, for appellant.—On question of venue and jurisdiction: Cole v. State, 16 Texas Crim. App., 461; Reed v. State, 16 id, 586; Kinman v. State, 39 S. W. Rep., 574; Strickland v. State, 13 S. W. Rep., 865; Ballow v. State, 58 S. W. Rep., 1023; Yost v. State, 38 S. W. Rep., 192; Brown v. State, 4 S. W. Rep., 538.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—Appellant was convicted of embezzlement and given the lowest term, two years, in the penitentiary.

It happens the statement of facts in this case is short. It in substance is, that on and prior to February, 1910, appellant and John Lowe had been partners in some cattle business. While thus interested they bought thirty-two head somewhere in eastern Texas and had left them there. Early in February appellant told Lowe he was going to eastern Texas to see about these thirty-two head of cattle and that he might buy some jerseys there. He also told Lowe that he was going to buy some lumber there for himself and suggested to Lowe, that he, Lowe, had better have him (appellant) to buy some lumber for him, Lowe, while he was on this trip. Thereupon, after talking the matter over with appellant, Lowe arranged to have appellant buy $1,000 worth of lumber for him while in eastern Texas and Lowe made arrangements with the bank at Jourdanton, the county seat of Atascosa County, to raise this thousand dollars and to let appellant have it, and which was arranged at the time to be used in the payment of the lumber in case appellant bought the same for Lowe while he was in eastern Texas. Lowe testified that at that time he authorized appellant, as his agent, to buy the lumber for him, Lowe, and when the purchase was made to draw on him, Lowe, or the bank for the amount of the purchase. Both of these parties lived in Atascosa County and all this arrangement was made between them while they were in Atascosa County, and by this arrangement between them the money was to be paid by Lowe in Atascosa County.

It seems that appellant then went to Center in Shelby County, Texas, and on February 11, 1910, drew this order or check:

"Jourdanton, Texas, Feb. 11th, 1910.

"No. ......

"Pay to the order of Farmers National Bank Center, Texas, $1,000, One Thousand Dollars.

"A. J. Poteet."

This check or order was indorsed as such matters usually are, by the Center bank: "Pay to the order of any bank, banker or trust company. All prior endorsements guaranteed." This first indorsement is not dated. The next indorsement is: "Pay to the order of any bank, banker or trust company. Feb. 12, 1910." Signed by the Citizens Bank & Trust Company, Austin, Texas. The next indorse-

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ment is substantially the same as the first above, signed by the Union Bank & Trust Company, Houston, Texas, and dated Feb. 17, 1910.

This check or order was received by the bank at Jourdanton from said Houston bank about Feb. 19, 1910. Prior to the arrival of this check or order, Lowe informed the bank that he had made arrangements with appellant whereby he was to let appellant have the thousand dollars to buy lumber for him, Lowe, and the bank was to take care of the check or order and charge the same to Lowe. That when the check or order arrived the banker at Jourdanton sent for Lowe. Lowe went in and after talking the matter over, Lowe himself indorsed the check and had the bank to pay it for him and the bank did pay it, stamping it paid with the regular stencil stamp of the Jourdanton bank on April 19, 1910. On February 23, 1910, appellant wrote and Lowe received from him a few days later, the following letter:

"Center, Texas, Feb. 23rd, '10.

"Mr. John Lowe,

"Friend John:

"I am doing everything I can to rush things, but the mill is overrun with orders for lumber and I have to wait for the dry kyln to dry it and I will get there all O. K. I am going out to a big shingle mill this Eve to contract one car of shingles will ship just as soon as I can. And it rains so here they can't haul the lumber. It has been raining for four days and just before we had a big snow so that the roads are almost impassable and it looks like snow again. I drawed a check on Jourdanton, but have not heard from it, and if anything has happened you see to it and send it at once. I will write you in the morning, tell you when they can ship the shingles.

"Jack Poteet."

It was after the receipt of this letter by Lowe that he indorsed personally the said check or order drawn by appellant and the bank then paid the money on the check or order.

The evidence shows that the arrangements then made at the Jourdanton bank in Atascosa County for the payment of this money by Lowe and its payment, were made at Jourdanton in Atascosa County.

Lowe never gave appellant his consent to use the said money for any other purpose than to buy lumber for him, Lowe; that the said amount, one thousand dollars, was appropriated by apellant to his own use and without the consent of said Lowe.

After making various inquiries and failing to receive the lumber or to hear from appellant in any way, Lowe went to East Texas, and made an investigation as to the whereabouts of appellant. It seems Lowe thought he had made away with, or had been drowned, and dragged the lakes and offered five hundred dollars reward for the body of appellant. Lowe never saw appellant from the time he left Atascosa County to go to East Texas early in February, 1910, until appellant returned to Atascosa County, more than a year afterwards.

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As soon as appellant returned to Atascosa County and Lowe saw him he, in Atascosa County, demanded of appellant the return of his money, but appellant never paid him one dollar.

Appellant, at the time of these transactions, himself had Seven Hundred and twenty-three dollars in said Jourdanton bank. Five Hundred Dollars of this Seven Hundred and Twenty-three dollars was used in payment of a note due said bank by appellant and the balance was paid to appellant's wife. Appellant, by his witnesses showed that while appellant was thus away, the witnesses thought he was dead and that his wife was in mourning for him.

It was also shown that the sheriff of Atascosa County had capiases for the arrest of appellant for more than a year before appellant's return, and, although he tried, could not locate him and did not arrest him; that after he had been away more than a year, he voluntarily returned to Atascosa County when he voluntarily surrendered.

The indictment charged that appellant was on or about February 23, 1910, in Atascosa County, Texas, was the agent of John Lowe and that as such agent he did then and there unlawfully and fraudulently embezzle and fraudulently misapply and convert to his own use, without the consent of said Lowe, One Thousand Dollars current of the United States of America and of the value of One Thousand Dollars, then and there the corporeal personal property of and belonging to said Lowe, which had theretofore come into the possession and was under the care of said appellant by virtue of his said agency. Appellant made a motion to quash this indictment because it "charges no offense against the laws of this State." How or why, is not disclosed in the motion, but the ground stated in the motion for new trial is that the indictment does not state "whether it was money or merchandise." The court correctly overruled this motion to quash.

The court gave a correct charge in the case and required the jury to believe the requisites of the offense of embezzlement in this case before they could find the appellant guilty. And the charge specifically required the jury to believe beyond a reasonable doubt that appellant in the county of Atascosa and State of Texas, as alleged in the indictment, unlawfully and fraudulently embezzled and fraudulently misapplied and converted to his own use the said One Thousand Dollars without the consent of said Lowe, thereby clearly and affirmatively requiring that the jury should believe that the offense was committed in Atascosa County before they could find the appellant guilty.

The most material contention of appellant in this case is that the District Court of Atascosa County did not have jurisdiction to indict and try appellant, claiming the offense was not committed in that county. Article 251 Code Criminal Procedure is: "The offense of embezzlement may be prosecuted in any county in which the offender may have taken or received the property, or through or into which he may have undertaken to transport it." Then, the question is

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whether or not the evidence shows that appellant received the money in Atascosa County or took it into said county?

This court, through Presiding Judge Davidson, in Pearce v. State, 50 Texas Crim. Rep., 507, in discussing Article 251, above quoted, among other things, held: "There can be no substantial difference in the construction of statutes in regard to civil and criminal cases, in regard to venue, unless those statutes expressly have different provisions. But where they are substantially the same in regard to conferring authority upon the different counties to entertain such venue or jurisdiction, the construction will be the same in both civil and criminal. It does not require authority to support the proposition in regard to civil cases. They are numerous in this State."

In the case of Cohen v. State, 20 Texas Crim. App., 224, the facts were stated to be that Cohen was employed by a certain firm in Galveston as a drummer to sell their goods. In order to fit him up to do this they selected a large amount of their goods as samples and packed them in trunks. Cohen was in and out of the store and examined these samples as they were being selected and packed. After the trunks were thus packed one member of the firm took the trunks to the depot of one of the railroads, had them checked to Luling in Caldwell County, where they were to be shipped and there actually delivered to Cohen. The firm then delivered to Cohen in Galveston the checks for said trunks. The samples and trunks themselves were not actually received by him until after they reached Luling where he, for the first time, took actual possession of them. He then took them from Luling to Laredo and sold and thereby embezzled the said goods. He was indicted, tried and convicted in Galveston County. He contended that Galveston County had no jurisdiction, but that Caldwell and the counties through which he took the goods after the actual receipt thereof, alone had jurisdiction. In this question the court held:

"There can be no question, in our opinion, that defendant's possession and control of the goods was complete, under the circumstances stated, in Galveston County. By selling the checks for the trunks to a third party in Galveston he certainly could have transferred the title and right to said third party to receive and demand possession of them at Luling; and we imagine that the checks would have entitled him to demand possession of the trunks in Galveston before they were shipped to Luling. We are of opinion the venue of the offense was properly laid in Galveston County. The property came into his possession in Galveston County as agent of the firm. (Penal Code, art. 786; Cole v. The State, 16 Texas Crim. App., 461.) Under the facts stated, appellant could have been tried for embezzlement in Galveston County, or 'in any county in which he may have taken or received the property, or through or into which he may have undertaken to transport it.' (Code Crim. Proc., art. 219; Reed v. The State 16 Texas Crim. App., 586; 62 Cal. 139.)"

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In Brown v. State, 23 Texas Crim. App., 214, it was shown that Moss employed Brown to travel over the country and sell and put up lightning rods for him. Moss fitted him up with a wagon and materials and sent him out under his employment. They were in Bosque County when this trade was made and when Moss fitted Brown up for selling and putting up lightning rods for him. Brown went into Robertson County, made a sale and put up rods for a party in Robertson County and there received $62 in cash therefor. Some trouble arose between Moss and Brown and Moss ordered Brown back to Bosque County where Brown went. When Brown got back to Moss in Bosque County the next day, Moss called on him for a settlement and he denied to Moss that he had collected any money from anyone. This was in Bosque County. Brown was indicted in Bosque County for the embezzlement of this money. He contended that Bosque County had no jurisdiction. The testimony tended to show that when Brown left Robertson County upon being called back by Moss, he took this $62 with him and the evidence also tended to show that he carried the $62 into Bosque County. The court held that the evidence was sufficient to show that he did carry this money into Bosque County and that that gave Bosque County jurisdiction, but did not base the affirmance of the case on that fact alone, but said: "If, however, there should be error in this view of the question, there is another view of it which, in our opinion, fixes the venue beyond any doubt in Bosque County. It was in Bosque County that it first appeared that the defendant had embezzled the money. He there denied that he had received it. He may not have conceived the fraudulent intent of appropriating it to his own use until the very moment when he denied having received it. At common law, and without reference to our statute, while it does not embrace, does not exclude, jurisdiction in such case. (2 Russell on Crimes, 9 Am. ed., 470, 471; 1 Bish. Crim. Prac., secs. 41, 61, and note; 2 Bish. Crim. Prac., 326)."

We think these cases are decisive of the question of jurisdiction against appellant in this case. Both Lowe and appellant lived in Atascosa County. In that county they made the trade and agreement whereby appellant was to purchase for Lowe in Eastern Texas, lumber, etc., and ship it from there to Atascosa County, and in that county they made the arrangements whereby Lowe was to there raise and there pay to appellant said money upon apellant purchasing and shipping to him, said lumber. Appellant falsely represented in a letter to Lowe, which was delivered to and received by Lowe in Atascosa County, that he had purchased and would ship to him this thousand dollars worth of lumber and drew a check or order on the Jourdanton bank for the thousand dollars which, strictly in accordance with their previous arrangements and agreement, Lowe paid to the bank for appellant in Atascosa County. The facts show that in law and in fact, appellant, in the manner detailed, received from

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Lowe in Atascosa County, the said thousand dollars, as directed by appellant in his said letter to Lowe. Again, as soon as appellant returned to Atascosa County, the first time Lowe saw him there, Lowe demanded of him the payment of the said thousand dollars which he had received, but appellant did not then or at any other time pay the same or any part thereof. We are clearly of the opinion, under the law and facts of this case, that Atascosa County had jurisdiction of this offense.

Appellant introduced some evidence which may have tended to show that he and Lowe were partners in the lumber business and that the said thousand dollars so furnished and paid by Lowe to him was for their partnership business. The court fully and correctly submitted this question to the jury and they found against appellant. We doubt if the evidence required any such submission, but as it was done, at appellant's instance, he can not complain.

Complaint is made that the court refused a charge by appellant to the effect that if appellant drew said check on his own account on the said Atascosa County bank in Jourdanton, and that he had an account with said bank at the time and Lowe indorsed said check at the instance of the bank and then the money was paid out of Lowe's money, that this created merely a civil liability of appellant to Lowe for the money so paid. No reason whatever is given in the charge itself why it should be given and it was complained of in such a general way in the motion for new trial as not to require this court to consider it. Byrd v. State, 151 S. W. Rep., 1068 and cases there cited. Even if we could consider this question, in our opinion, the evidence does not raise it sufficiently to require the court to have given it. The facts all show that this check or order by appellant on the Jourdanton bank was not to be paid out of his personal individual funds even if he had them in the bank. The letter he wrote to Lowe, copied above, together with all the other facts and circumstances, clearly show that he drew this check for the thousand dollars which was arranged to be raised and paid to him by Lowe for the purchase of lumber for Lowe and that it was, as intended and requested by him, so raised and paid by Lowe out of Lowe's money and was not intended to be raised or drawn against his (appellant's) individual account.

There is a complaint by appellant to the prejudice of one of the jurors against him, shown by the affidavit of an outside party, which is attached to and made a part of the motion for new trial. The judgment of the court thereon specifically states that in hearing said motion, the court also heard the evidence thereon submitted, and overruled the same. What this evidence was, is in no way disclosed by the judgment or the record. This being the case we must presume, which we do, that the court made an investigation of it at the time he heard the motion, heard the evidence thereon and that appellant's contention was not sustained.

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We have considered all of appellant's complaints. None of them show reversible error. It is useless to take up and discuss them separately. The judgment is affirmed.

Affirmed.

[Rehearing denied February 26, 1913.—Reporter.]

Price De Friend v. State.

No. 2263. Decided February 5, 1913.

1.—Carrying Pistol—Statement of Facts.

Where the statement of facts in a misdemeanor case was filed thirty days after the adjournment of the County Court, the same could not be considered on appeal. Following Mosher v. State, 62 Texas Crim. Rep., 42, 136 S. W. Rep., 467, and other cases.

2.—Same—Bill of Exceptions—Misdemeanor.

In misdemeanor cases, the trial court is without authority to authorize the filing of bills of exception after twenty days from the adjournment of the court. Following Misso v. State, 61 Texas Crim. Rep., 241, 135 S. W. Rep., 1173, and other cases.

3.—Same—Charge of Court—Carrying Pistol.

Where appellant carried the pistol in the bottom of a buggy on his way home, and then left the road and took the pistol out of the buggy and discharged it several times and then returned it to the bottom of the buggy, there was no error in refusing a requested charge that under such a state of facts, the defendant should be acquitted, although the court's main charge may have to some extent been on the weight of the evidence. Following Hill v. State, 50 Texas Crim. Rep., 619, and other cases.

Appeal from the County Court of Shelby. Tried below before the Hon. E. W. Hooker.

Appeal from a conviction of unlawfully carrying a pistol; penalty, a fine of $100.

The opinion states the case.

Davis, Davis & Davis, for appellants.—On question of court's charge: Cathey v. State, 23 Texas Crim. App., 492; Mitchell v. State, 38 Texas Crim. Rep., 170; Hardy v. State, 37 Texas Crim. Rep., 511; Fretwell v. State, 52 Texas Crim. Rep., 499; George v. State, 29 S. W. Rep., 386; Ross v. State, 28 S. W. Rep., 199; Ball v. State, 25 S. W. Rep., 627.

C. E. Lane, Assistant Attorney-General, for the State.—Cited cases in opinion.

DAVIDSON, Presiding Judge.—This conviction was for carrying a pistol in violation of the law.

There are several interesting questions presented in the brief and motion for new trial, based upon the rulings of the court, as shown by bills of exceptions. These can not be considered, however, inas-

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much as the statement of facts and bills of exceptions were filed thirty days after the adjournment of court. This is a misdemeanor and the law does not authorize the filing of statements of fact and bills of exception, even under order of the court, after the expiration of twenty days after the court trying the case has adjourned. See Mosher v. State 62 Tex. Crim. Rep., 42, 136 S. W. Rep., 467; McGowen v. State, 63 Tex. Crim. Rep., 85, 138 S. W. Rep., 402; Hooper v. State, 62 Tex. Crim. Rep., 105, 138 S. W. Rep., 396; Davis v. State, 62 Tex. Crim. Rep., 537, 138 S. W. Rep., 396; Thompson v. State, 64 Tex. Crim. Rep., 514, 142 S. W. Rep., 908; Gavinia v. State, 65 Tex. Crim. Rep., 572, 145 S. W. Rep., 594. It is also held that in prosecutions for misdemeanor, the court is without authority to authorize filing bills of exception beyond twenty days from the adjournment of the term. Misso v. State, 61 Tex. Crim. Rep., 544, 135 S. W. Rep., 1173; Sullivan v. State, 62 Tex. Crim. Rep., 410, 137 S. W. Rep., 700; Mueller v. State, 61 Tex. Crim. Rep., 544, 135 S. W. Rep., 751; Gavinia v. State, 65 Tex. Crim. Rep., 572, 145 S. W. Rep., 594. This eliminates all questions raised with reference to the statement of facts and bills of exception.

The motion for new trial criticises that portion of the court's charge which instructed the jury as follows: "You are further charged that by on or about his person, as used in our statutes in connection with the carrying a pistol is meant, that the pistol that is alleged to have been carried must have been within easy access of the person carrying it; that the pistol could have been secured with practically no effort on the part of the person charged. And you are the judges of whether a pistol carried at a certain place comes within this meaning." In this connection appellant offered the following charge which was refused: "You are instructed as a part of the law in this case, that if you find from the evidence that the defendant, Price De Friend drove from the residence of himself and his uncle's to Frank Bright's with a pistol in the bottom of his buggy, and from there towards the home of the prosecuting witness, Mrs. Willie Price, and at a distance from the road leading to her home took the pistol out of the buggy and discharged it one or more times, and then immediately returned it or put it back in the bottom of the buggy, while in the same place at which it was discharged and then went from there to the home of the prosecuting witness and from that point to his home without removing the pistol from the bottom of the buggy, that he would not be guilty of carrying a pistol on or about his person, as charged in the indictment, and if you so find, you will return a verdict of not guilty." This charge was refused. The objection to the court's charge was that it was on the weight of the evidence. While this criticism of the charge may to some extent be correct,—yet, if the facts are as stated in the requested instruction and as intimated in the charge given, we are of the opinion that it was not of such material character as should reverse the

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judgment. If appellant carried the pistol under the circumstances indicated in the requested instruction, we are of opinion that he was guilty and the verdict of the jury would be sustained on the facts stated in the requested charge and the court was not in error in refusing said charge. Hill v. State, 50 Texas Crim. Rep., 619; James v. State, 51 Texas Crim. Rep., 633; Johnson v. State, 51 Texas Crim. Rep., 648; Leonard v. State, 56 Texas Crim. Rep., 84; Prewitt v. State, 49 Texas Crim. Rep., 323; Garrett v/ State, 25 S. W. 285.

As the record is presented, the evidence and the bills of exceptions being filed too late, we are of opinion there are no such errors presented that require a reversal of the judgment. Therefore, it is ordered that it be affirmed.

Affirmed.

J. D. CARPENTER v. STATE.

No. 2257. Decided February 5, 1913.

1.—Simple Assault—Verdict—Degree.

Where, upon trial of aggravated assault, the court's charge limited the jury to the consideration of a simple assault only, and the verdict assessed a fine of five dollars, there was no uncertainty as to the degree of which the jury found defendant guilty, and there was no error because the verdict did not specify of what degree they convicted defendant.

2.—Same—Charge of Court—Misdemeanor—Practice on Appeal.

In the absence of bills of exception to the court's action in refusing special charges in misdemeanor cases, where the conviction is justified by the information or the facts, this court cannot review the matter.

Appeal from the County Court of Foard. Tried below before the Hon. T. W. Staton.

Appeal from a conviction of simple assault; penalty, a fine of $5.

The opinion state the case.

J. L. Carpenter, for appellant.—On question of insufficiency of verdict: Steinberger v. State, 35 Texas Crim. Rep., 492; Hays v. State, 33, id, 546; Evans v. States, 57 Texas Crim Rep., 174, 122 S. W. Rep., 392.

On question of charge of court: Jackson v. State, 22 Texas Crim. App., 442.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was charged with aggravated assault and battery.

The court charged the jury limiting the consideration of the jury to simple assault. Appellant asked two instructions, one not to consider aggravated assault and the second giving the appellant's view of self-defense. Both requested instructions were given.

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The verdict of the jury reads as follows: "We, the jury find the defendant 'guilty' of an assault as charged in the information and assess his punishment at a fine of $5." Contention is made that this verdict is insufficient inasmuch as appellant was charged with aggravated assault and it is left indefinite by the terms of the verdict as to what offense appellant was convicted. Quite an array of authorities are cited in support of appellant's proposition, but an inspection of those cases will show that wherever a party is charged with an aggravated assault and that offense as well as simple assault have been submitted to the jury and the jury find a general verdict, without specifying of what degree they convicted, the verdict is insufficient; but the authorities equally well settle the proposition that where only one of the degrees is submitted and the verdict assesses the punishment commensurate with the degree submitted as prescribed by the Legislature in regard to the degree submitted, this will be sufficient to leave no uncertainty as to the degree of which the jury found the party accused guilty. These questions have been discussed in many cases and the rule is well settled that where only one degree of the offense has been submitted though the verdict is general, it will be sufficient. Moody v. State, 52 Texas Crim. Rep., 232; Styles v. State, 37 Texas, Crim. Rep., 599; Millard v. State, 59 S. W. Rep., 273; McCulloch v. State, 65 S. W. Rep., 94; Wilson v. State, 74 S. W. Rep., 315; Heinen v. State, 74 S. W. Rep., 776. We are of opinion, therefore, that inasmuch as the jury were confined in their consideration, alone to the degree of simple assault and their verdict corresponding to the punishment prescribed by the Legislature for that offense, that there is no uncertainty about the verdict and this question presents no error.

This being a misdemeanor, the other omissions or supposed omissions on the part of the court in charging the jury, will not be considered. Under our authorities it seems to be well settled that where a charge is sought to be held erroneous, unless fundamentally so, the exceptions must be taken either by bill or motion for new trial and special charges asked to cover the supposed defects in the court's charge, and in the absence of one of these methods, this court will not be justified in reversing the judgment. We are not speaking of that class of cases where the court authorized a conviction not justified by the information or the facts.

Finding no reversible error in the record the judgment is affirmed.

Affirmed.

J. P. HALL v. STATE.

No. 2247. Decided February 5, 1913.

1.—Theft from Person—Charge of Court—Imputing Crime to Another.

Where upon trial of theft from the person, there was evidence that another person committed the theft, this issue should have been submitted to the jury in a proper charge, as requested by the defendant.

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2.—Same Evidence—General Reputation.

Where, upon trial of theft from the person, there was evidence tending to show that another party committed the theft, the reputation of such party was an issue in the case and testimony as to his general reputation was admissible.

Appeal from the District Court of Wichita. Tried below before the Hon. P. A. Martin.

Appeal from a conviction of theft from the person penalty, two years imprisonment in the penitentiary.

The opinion states the case.

P. B. Cox, for appellant.—On question of admitting evidence as to general reputation of party to whom the crime was imputed M. K. & T. Ry. Co. v. Adams, 42 Tex. Civ. App., 274, 114 S. W. Rep., 453; Zysman v. State, 60 S. W. Rep., 669; Harris v. State, 45 S. W. Rep., 714; Casey v. State, 50 Tex. Crim. Rep., 392, 97 S. W. Rep., 496; Dickson v. State, 15 Texas Crim. App., 271.

On question of court's charge as to imputing crime to another: Dubose v. State, 10 Texas Crim. App., 230; Wheeler v. State, 56 Tex. Crim. Rep., 547, 121 S. W. Rep., 166; Harrison v. State, 83 S. W. Rep., 699; Kirby v. State, 49 Tex. Crim. Rep., 517, 93 S. W. Rep., 1030; Murphy v. State, 36 Texas Crim. Rep., 24.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was convicted of theft from the person, and his punishment assessed at two years confinement in the State penitentiary.

The State's testimony would show that appellant was the person who stole the money. That the money was stolen, and from the person of W. J. Hannan while he was asleep is proven beyond doubt, but the defendant and his witnesses would make Troy Lane the one guilty of the offense. Defendant swears that he saw Lane go into the pockets of Hannan while he was asleep, and that he reported these facts to the officers that night. In this he is supported by the officers who testify that appellant did report the matter to them, and they arrested Lane that night. The issue was sharply drawn by the testimony, whether appellant or Lane was the thief, and appellant requested a charge that if the jury found and believed that Troy Lane took the money from the prosecuting witness, Hannan, they would acquit him, or if they had a resonable doubt as to whether or not said Troy Lane took said money they should acquit. We are of the opinion this charge should have been given. Under an unbroken line of decisions this court has held that where the testimony raises the issue that another person may have committed the offense, this issue must be submitted to the jury in the charge of the court, and where a special charge is requested and refused, this will present reversible error. It might be said that the only contested issue in

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this case was, who took the money, defendant or Troy Lane. The State's testimony would show that defendant was the person who did so, while the testimony offered in behalf of defendant would show that Troy Lane was the person who took the money.

The other matters presented in the motion for a new trial we do not deem it necessary to discuss, as they will not likely occur on another trial. But we will say that defendant and his testimony tending to show that Troy Lane was the person who had stolen the money, his reputation for honesty would be an issue, and it was permissible for the State to prove his general reputation in this respect.

The judgment is reversed and the cause is remanded.

Reversed and Remanded.

J. T. WADDLE v. STATE.

No. 2064. Decided February 5, 1913.

Perjury—Indictment—Mortgaged Property.

Where the indictment for perjury failed to negative the fact that a mortgage had been given, as claimed by defendant's testimony upon which the charge of perjury was based, and failed to negative the fact that the party had disposed of mortgaged property, etc., the same was insufficient on motion to quash.

Appeal from the District Court of Comanche. Tried below before the Hon. J. H. Arnold.

Appeal from a conviction of perjury; penalty, three years imprisonment in the penitentiary.

The opinion states the case.

Smith & Palmer, for appellant.—On question of insufficiency of the indictment: Pierce v. State, 17 Texas Crim. Rep., 32.

C. E. Lane, Assistant Attorney-General, and *J. R. McClellan,* District Attorney, for the State.

HARPER, JUDGE.—In this case it is made to appear that appellant went before a justice of the peace and swore out a complaint against J. C. Hale, charging him with disposing of mortgaged property. Upon the examining trial it appears that appellant swore that Hale owed him two notes, one for $650 and one for $80 and he had a mortagage to secure the payment of the $650 note. The predicate upon which the charge of perjury is sought to be based is, that in fact Hale did not owe him a note for $650, but only owed him the $80 note. A debt being established beyond the peradventure of a doubt, the material issue in the case against Hale would be shown had he disposed of mortgaged property. There is no allegation in the indictment that a mortgage had not in fact been given to secure the

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$80 debt. If we look to the entire record, from the State's standpoint, it discloses that Hale had in fact given appellant a note for $650 and a mortgage to secure the payment of it, while in fact he had not given any mortgage to secure the note for $80. That the note for $80 was a genuine note, while the $650 note was given to prevent Hale's creditors from levying on his crop, and appellant in testifying that Hale owed him this note and had paid him, testified falsely. The evidence would sustain a case of perjury based on these facts, but the allegations in the indictment do not correspond with the evidence.

There is no allegation in the indictment that there was no mortgage to secure the $80 note; there is no allegation in the indictment that the $650 note was without consideration, and the mortgage was without consideration. The real facts, from the State's view point, are, that no debt was due upon which a mortgage was given to secure, yet there are no such allegations in the indictment. The indictment failing to negative the fact that a mortgage had been given, and failing to negative the fact that Hale had disposed of mortgaged property, it is insufficient in law to charge perjury.

The material issue was, had Hale disposed of mortgaged property, but in the indictment this issue is wholly ignored. From the evidence we would be authorized to infer that appellant swore falsely as to the amount of his debt, and as to the amount paid him by Hale, but this does not cure the lack of allegations in the indictment. From the evidence we would be authorized to draw the conclusion that appellant testified that Hale owed him $650, and he had mortgage on his cotton crop to secure same, which allegations were in fact untrue, but there are no allegations of this character in the indictment.

We are of the opinion that the indictment charges no offense, and the judgment is reversed and dismissed.

Dismissed.

CHAS. SMITH, ALIAS CHARLES TARVER, V. STATE.

No. 2222. Decided February 5, 1913.

Theft—Insufficiency of the Evidence.

Where, upon trial of theft, the evidence did not show that the alleged suit of clothes which was found in defendant's possession was identified as the property of the alleged owner, the conviction could not be sustained.

Appeal from the County Court of Tarrant. Tried below before the Hon. R. E. Bratton.

Appeal from a conviction of misdemeanor theft; penalty, ninety days in the county jail.

The opinion states the case.

No brief on file for appellant.

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C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—Appellant by complaint and information was charged with the theft of a suit of clothes of the value of $10, the property of Will Monnig. He was convicted and his punishment fixed at ninety days confinement in the county jail.

The judgment is attacked solely on the ground that the evidence is insufficient to sustain the verdict. The evidence as contained in the record is very meager.

William Monnig testified that he was in the mercantile business in Fort Worth, Texas, indentifying his place of business; that he had full charge thereof; that he did not give appellant permission or authority to take any clothes owned by him, either out of his store or out of the boxes situated on a vacant lot leased by him just back of his store or out of the boxes in the alley between the lot and his store, and if he did so it was without his consent; that he knew nothing of any clothes having been stolen from him; that the alley is a public alley of Fort Worth, and he did not know who put the boxes on the lot or the alley. William Walker testified that on Friday and several other days before the Wednesday night that appellant is charged with this offense that appellant and Govnor Peace, a negro working for Monnig, were talking together and seemed to be rather chummy; that it aroused his suspicion against the negro employe; that on the Wednesday appellant is charged with this offense a little Mexican found a suit of clothes in a box on the lot back of Monnig's store which belonged to Monnig and that the witness and Mr. Wandry, both employes of Monnig at his store, agreed to watch the boxes back of the store; that about 7:30 p. m. on that day Govnor Peace came into the alley between Monnig's store and the lot where he had his boxes; that they had lunch and a bucket of beer, but no other bundle than the lunch; that when they reached a box in the alley, Govnor Peace pushed one box off the other and fumbled around in the lower box and took from it a bundle wrapped in brown paper, and when they sat down they laid this bundle between them while they ate their lunch. After eating appellant took the bundle up and both of these negroes went towards the end of the alley, Peace in the lead, and when he reached the street made a motion to appellant and appellant tore off the paper, took out the suit of clothes, threw it across his arm and went on to the street and turned east and went out of his sight; that the suit of clothes was a dark blue with a small stripe. The next morning he found a suit of Monnig's clothes in the box that he saw them take the bundle out of, the evening before. He produced that suit and the one the Mexican had found, in court on the trial and exhibited them. That he saw four white men eat lunch about forty feet from these negroes when they ate their's; that when appellant disappeared around the building he (witness) ran down the stairs of the store where he was

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watching them and attempted to go out at the front door, but finding it locked, was delayed somewhat in getting out. After he got out he and Mr. Wandry saw the negro Govnor Peace on 12th street go into the back door of a saloon across the street from where he left the alley. One of them went in the front and the other the back door of the saloon and got Govnor Peace and later turned him over to the officer.

William Smith testified that about 7:30 or 8 p. m. on the Wednesday appellant was charged with this offense appellant came into his store; that he kept a second-hand store, and appellant offered to sell him a dark blue, or black suit of clothes; the witness was across the table from the appellant at the time; that it was dusk outside and pretty dark inside, he could not tell whether they had stripes on them or not; that appellant offered to take $7.50 and the witness would have given him $4.50 for them; that when witness declined to buy, appellant took the clothes and left and the witness had not seen him since; that about a half hour later the officer came to this witness inquiring about the clothes and he told the officer what he knew.

Mr. Bell, said officer, a city detective, testified that he was called over the 'phone to where the witness Walker and Mr. Wandry were with Govnor Peace and he arrested Peace and took him to the city hall, then went from one second-hand store to another when he received the information concerning the suit of clothes having been offered for sale; that he arrested the appellant the next day.

This is in substance the whole of the testimony. It does not appear that the suit of clothes the defendant had was the property and identified as such of Monnig. They seem never to have been recovered from anyone.

In our opinion the evidence is insufficient to sustain the verdict. The judgment is, therefore, reversed and the cause remanded.

Reversed and Remanded.

P. A. STEWART V. STATE.

No. 2237. Decided February 5, 1913.

1.—Local Option—Bill of Exceptions.

Where the bill of exceptions is not approved by the trial judge, the same cannot be considered on appeal.

2.—Same—Charge of Court—Other Transactions—Weight of Evidence—Singling Out Testimony—Intent.

Where, upon trial of a violation of the local option law, there was evidence that intoxicating liquors were found on the premises controlled by defendant and claimed by him, and the court charged the jury that this testimony could only be used for the purpose of showing the intent of the defendant to commit the offense, the same was a charge on the weight of the evidence and reversible error in ascribing it to the purpose of proving intent of defendant. Following Rice v. State, 49 Texas Crim. Rep., 569, and other cases.

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Appeal from the District Court of Potter. Tried below before the Hon. John W. Veale, special Judge.

Appeal from a conviction of a violation of the local option law; penalty, one year imprisonment in the penitentiary.

The opinion states the case.

Reeder & Dooley and *W. F. Ramsey,* for appellant.—Cited cases in opinion.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was convicted for violating the local option law.

McMurtry, the Sheriff of Briscoe County, testified to having purchased a bottle of whisky from appellant in Potter County in the city of Amarillo. This was strenuously denied by appellant, who testified that he did not sell any whisky to McMurtry, but gave him a bottle and that when McMurtry offered to pay him he declined to accept the money. McMurtry testifies that he went to appellant to buy the whisky and induced him to sell the whisky to him as a means of aiding the sheriff of Potter County in detecting the violations of local option law. A deputy sheriff named Pollard testified that after the alleged transaction, he searched apellant's premises and found a lot of whisky and beer in considerable quantities. There is what purports to be a bill of exceptions in the record to the introduction of this evidence, but the bill is not approved by the trial judge, and, therefore, it cannot be considered.

The court charged the jury as follows: "In this case certain evidence has been introduced before you tending to establish the fact, that at or about the date of the alleged commission by the defendant of the offense charged, that there was other different intoxicating liquor found on the premises controlled by him, and claimed as the property of the defendant; you are instructed that you cannot consider such possession, if any, of said intoxicating liquors, if any, for any purpose, except for the purpose of showing, if it does, the intent, if any, on the part of the defendant to commit the offense charged in the indictment, if you find any offense was committed." Various objections were urged to this charge. We are of the opinion this is a charge upon the weight of the evidence and singles out some of the facts introduced in evidence, and instructed the jury same could be used for a certain purpose. It is also objected that the evidence could not be used for the purpose mentioned by the court, that is, to show the intent on the part of the defendant to commit the offense charged in the indictment. We are of the opinion these exceptions are well taken. The writer has never believed and does not now believe this court laid down the correct rule in Myers v. State, 52 Texas Crim. Rep., 558 and Wagner v. State, 53 Texas Crim. Rep.,

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306. He further believes the correct rule was laid down in the opinions overruled in the Myers case, but the majority of the court has seen proper to lay the rule down as indicated in those opinions, and, therefore, they will be followed by the writer until they are overruled and a correct enunciation of the law made. I do not purpose here to go into a discussion of those matters. In the Myers case the judgment was reversed because over the objection of appellant the State was permitted to show the search for and seizure of intoxicants as mentioned in that opinion, but held it could be shown that the accused had in his possession a large quantity of whisky at or about the time of the offense alleged to have been committed and charged by the prosecution. It was also laid down in Wagner v. State, supra, that this was admissible as confirmatory or as corroborative of the testimony of the State when the issue was whether there had been a sale vel non. The proposition seems to be deducible from those cases that such testimony was admissible as showing that inasmuch as an accused had a large amount of intoxicants on hand, that it would tend to confirm or corroborate the State's witness to the effect that a sale was made. If it is the contention of the State that a sale was made, this character of testimony was admissible as tending to show that inasmuch as he had such intoxicants on hand, that he might have made the sale. But corroborative testimony of this character does not bear only upon the intent. If appellant made a sale, of course he had the intent to make the sale, that is, if the article sold was shown to be an intoxicant and he knew it was an intoxicant at the time he made the sale. It has always been the rule in Texas in all the decisions that the court is prohibited from singling out certain facts and charging the jury in relation to the weight of those facts, unless thereunto authorized by statute. There is no statute authorizing this character of charge in this sort of a case, and the evidence was not introduced for the purpose of showing the defendant's intent, but it was introduced to show the liklihood of the fact that he violated the law and as corroborative of the State's witness McMurtry that a sale was made. The authorities are too numerous to undertake to mention them here. In Barnes v. State, 37 Texas Crim. Rep., 320, it was held that certain evidence as to the appearance of a child three or four months old was not admissible. In that case the jury had been instructed that the evidence with reference to the color of the child's eyes, hair and complexion was admissible solely for the purpose stated in the charge. In that opinion the court said: "Even if it were admissible and the proof had been offered as to complexion, features, etc., of the defendant, the charge of the court was erroneous in calling attention to a particular part of the testimony that could be used by the jury for no other purpose than to show paternity and thus give it undue weight with the jury." The same rule was followed in Martin v. State, 46 Texas Crim. Rep., 285. In the Rice case, 49 Texas Crim. Rep., 569, the same rule was followed, and the

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judgment in those cases were reversed on account of the charge upon the weight of the evidence. A review of those cases is not deemed necessary here. And to the same effect is Brown v. State, 25 Texas, 195, and Kirk v. State, 35 Texas Crim. Rep., 224. It was said in Kirk v. State, supra, that the charge should not convey to the jury by any word in the charge, or in any other manner, what the court's impressions are as to any part of the testimony. We are of the opinion that this charge was not only upon the weight of the testimony and singles out the fact that appellant had whisky and it was on hand, but it was further erroneous as a charge on the weight of the evidence in telling the jury for what purpose it was introduced, and for what purpose they could consider it, and also that the court was in error in ascribing it to the purpose to which he did ascribe it in the charge.

The judgment is reversed and the cause is remanded.

Reversed and Remanded.

J. O. POWDRILL V. STATE.

No. 1914. Decided June 19, 1912.

Rehearing denied February 5, 1913.

1.—Murder—Evidence—Former Difficulty—Motive.

Upon trial of murder, there was no error in permitting the State to introduce testimony as to a former difficulty between the defendant and deceased occurring several years before the homicide, as to what was said and done during that difficulty, without giving the details thereof, but showing that defendant made an assault with a knife upon deceased and that the difficulty grew out of the separation of his parents and ending by defendant telling deceased, his son, to leave his house; and this, although a partial reconciliation had occurred sometime before the killing. Davidson, Presiding Judge, dissenting.

2.—Same—Evidence—Threats—Motive—Reconciliation.

Upon trial of murder, there was no error in admitting in evidence the threats of the defendant against the deceased made at different times, and this, although a partial reconciliation had occurred between defendant and deceased since these threats were made. Following Leech v. State, 63 Texas Crim. Rep., 339.

3.—Same—Evidence—Papers in Civil Suit—Motive.

Where, upon trial of murder, it developed that the homicide grew out of divorce and injunction proceedings which the wife of the defendant had instituted against him, and in which her son, the deceased, supported her, there was no error in admitting in evidence so much of the proceedings in the civil suit which explained the transaction without introducing the details thereof. Davidson, Presiding Judge, dissenting.

4.—Same—Charge of Court—Manslaughter.

Where, upon trial of murder, the evidence showed that the homicide grew out of certain divorce and injunction proceedings instituted by the wife of the defendant against him, and in which deceased assisted her; that defendant had made different threats at different times on account of this against the

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deceased, threatening to kill him if he continued meddling with his affairs, and that he finally did kill him for this reason, and there was no evidence which tended to show sudden passion or adequate cause, there was no error in the court's failure to charge on manuslaughter. Davidson, Presiding Judge, dissenting. Following Redman v. State, 52 Texas Crim. Rep., 591.

5.—Same—Charge of Court—Self-defense—Manslaughter.

It is the well established law of this State that where the case presents either murder or perfect self-defense, there is no error in the court's failure to charge on manuslaughter; besides, in the instant case, there was no evidence of self-defense. Following Treadway v. State, 65 Texas Crim. Rep., 208.

6.—Same—Former Decision—Practice on Appeal—Manslaughter.

Where, upon a former appeal, this court did not pass upon the question of manslaughter, but the case was reversed upon another ground, and the court merely called attention to the question of manslaughter, the instant case cannot be controlled by that opinion; besides, the court charged upon manslaughter in the instant case on the only possible theory suggested by the evidence, and there was no error.

7.—Same—Charge of Court—Res Gestae Statements.

Where, upon trial of murder, the res gestae statement of defendant that he had to kill deceased because he came at him with a knife was not an admission or confession by him, and was part of the res gestae of the transaction; and besides, the State introduced other evidence upon which to base a conviction of murder, all of which was submitted under a proper charge of the court, there was no error in the court's failure to instruct the jury that they could not convict defendant because of his res gestae statement, unless they found the same untrue beyond a reasonable doubt. Davidson, Presiding Judge, dissenting. Following Slade v. State, 29 Texas Crim. App., 381, and other cases.

8.—Same—Charge of Court—Murder—Cooling Time—Limiting Evidence.

Where, upon trial of murder, the court, according to the facts, submitted the different degrees of murder and cooling time and properly limited the testimony with reference to a former difficulty, there was no error.

9.—Same—Charge of Court—Explanation.

Where, upon trial of murder, the evidence raised circumstantially the question that defendant approached deceased for an explanation of certain troubles between them, the court properly submitted a charge thereon; besides, this was in favor of defendant, and he could not complain.

10.—Same—Charge of Court—Requested Charge—Art. 743, C. C. P.

Where, upon trial of murder, the charge of the court properly embraced every matter raised by the evidence, and there were no errors of omission or commission in the charge which could result in injury to defendant, there was no error on this ground, under Article 743, Code Crim. Proc.

Appeal from the District Court of Rusk. Tried below before the Hon. W. C. Buford.

Appeal from a conviction of murder in the first degree; penalty, imprisonment in the penitentiary for life.

The opinion states the case.

D. M. Short & Sons, for appellant.—On question of reconciliation between parties: State v. Horn, 116 N. C., 1037; People v. Hyndman, 99 Cal., 1; State v. Barnwell, 80 N. C., 466; Clark v. State, 56 Am. Rep., 45; People v. Colvin, 50 Pac. Rep., 539; People v. Thomson, 28 Pac. Rep., 589.

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On question of want of malice: Dixon v. State, 51 Texas Crim. Rep., 555; Farrer v. State, 42 Texas, 265.

On question of introducing papers in civil suit: Pinckford v. State, 13 Texas Crim. App., 468; Binns v. State, 26 Am. Rep., 48; People v. Conklin, 67 N. E. Rep., 624; Moody v. State, 24 Texas Crim. App., 458; Draper v. State, 22 Texas, 401; Long v. State, 17 Tex. Crim. App., 128; Hardin v. State, 40 Texas Crim. Rep., 208; Abrams v. State, 40 S. W. Rep., 798.

On question of court's charge on manslaughter: Snowberger v. State, 58 Texas Crim. Rep., 530; Brown v. State, 54 id, 121; Keith v. State, 50 id. 63; Grant v. State, 55 id. 284.

On question of cooling time: Dixon v. State, 51 Texas Crim. Rep., 555; Rice v. State, 51 id, 255; Cooper v. State, 49 id, 28; Manning v. State, 48 id., 55; Mayhew v. State, 65 Tex. Crim. Rep., 290, 144 S. W. Rep., 229; McCoy v. State, 25 Texas, 33; Watson v. State, 50 Texas Crim. Rep., 171.

On question of res gestae statements of defendant: Winkler v. State, 58 Texas Crim. Rep., 564; Gibson v. State, 53 id, 349; Combs v. State, 52 id, 613; Pratt v. State, 50 id, 231; Monroe v. State, 47 id. 63; Caselton v. State, 57 id. 436.

C. E. Lane, Assistant Attorney-General, and *Blount & Strong,* for the State.—On question of former difficulty: Howard v. State, 25 Texas Crim. App., 686; Anderson v. State, 15 id, 447; Mathir v. State, 34 Texas Crim. Rep., 39.

On question of divorce and injunction proceedings: Powdrill v. State, 62 Texas Crim. Rep., 442; Turner v. State, 33 id, 103.

PRENDERGAST, Judge.—On August 4, 1910, appellant was duly indicted by the grand jury of Shelby County for the murder of his son, Oscar Powdrill, on June 23, 1910. There was a trial of the cause had first in Shelby County at which the appellant was convicted of murder in the first degree. On appeal to this court the cause was reversed. The opinion is reported in 62 Tex. Crim. Rep., 442, 138 S. W. Rep., 114. Thereafter the venue of the case was properly changed from Shelby to Rusk County and a second trial had in January, 1912, when the appellant was again convicted of murder in the first degree and his penalty fixed at life imprisonment.

On the first trial appellant testified in his own behalf. On the last he did not. Some of the witnesses who testified on the first trial did not testify on the second; while some who did not testify on the first, testified on the second trial.

It is unnecessary to make an extended statement of the evidence. There was very little if any conflict in the evidence. In order to bring out and decide the questions raised, we will make a brief, but substantial statement of the evidence.

In November, 1907, some trouble arose between appellant and his wife which resulted at that time in their separation, she leaving or

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being forced to leave their home. They had then been married many years and had several children, some of whom were then grown. Among them was Oscar, their son, the deceased. Oscar had been away from home some time. About November 4, 1907, he returned home and found that his mother and father had separated and that his mother was away from the home. His father would not let her come back. When Oscar reached home that night, finding his mother gone, he spoke to his father and said: "What does this mean?" His father, appellant replied, "I do not know that that is any of your damn business." His father then attempted to get a gun to shoot his son Oscar, but was prevented by some one present from doing so. He then assaulted Oscar, kicked him, got out his knife and cut him and ordered him to leave home. Oscar did so. When Oscar was then leaving, appellant told him if he caught him monkeying with his business any more he would kill him. The next morning appellant also told Bud McKenzie, who was talking with him about what had occurred between him and Oscar, the night before, that he "liked to have killed Oscar," the night before, and if he came there cutting up again he would kill him. About the same time he also told Frank Patterson that if Oscar did not quit meddling with his business he would kill him. The morning after appellant's assault on Oscar, he told his son Bob that if Oscar ever meddled with his business any more, he was going to kill him.

Either the last of April or first of May, 1910, appellant was in the office of Mr. Sanders, an attorney in Center, talking to Mr. Sanders about his, appellant's, family and domestic matters and trouble and about Oscar's taking up for his mother and in that conversation he said to Mr. Sanders, "Oscar is taking up for his mother and prying into my domestic affairs, and if he keeps it up I am going to kill him." A short time before the killing and the Monday when appellant met his wife and son investigating his sale of some hogs and when appellant was returning from, or going to Athens, he met S. M. Adams; they had been acquainted for many years; after they talked a while Adams asked him how he was getting along and he replied that he was not getting along much; that the world had gone against him and when asked what was the trouble, and when told by Mr. Adams if he would leave it to Mrs. Powdrill and go back and do what she said that things would blow over, and after discussing the matter further, as the witness expressed it, one word brought on another and appellant said, "If things don't change Hell will be to pay."

When this said assault and cutting of Oscar occurred appellant's wife had either then sued him or did sue him for a divorce, praying for an injunction against him. Soon after this a reconciliation occurred between appellant and his wife. That suit for divorce was then abandoned, she returning to her home and they continued to live together until January, 1910.

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In January, 1910, trouble again arose between appellant and his wife and on February 13, 1910, she again sued him for a divorce and prayed for an injunction on which was granted by the Judge of the District Court of Shelby County in the divorce suit. So much only of this divorce and injunction proceedings was introduced as to show that appellant and his wife were married in September, 1880 and that they continued to live together until January 19, 1910; that during their marriage they accumulated both real and personal property and among other things about 100 head of hogs. She prayed that appellant be required to return an inventory and appraisement under oath of all their property; that she be allowed to remain in possession of their homestead and other personal property and that a writ of injunction issue restraining him from interfering with her possession of the same, or coming about plaintiff or said premises, or molesting her in any way, and restraining him from disposing of any of said property or contracting any debts on account thereof until the further order of the court; that the court granted her prayer and upon her entering into bond required him to return said inventory and enjoined him from selling or otherwise disposing of or wasting any of said property or incurring any debts or liability that would incumber the same; that that divorce cause would be heard on the first Monday in August at the August term of said court. The appellant was at once duly served with proper citation and the said writ of injunction. So much of the injunction bond was introduced as to show who the sureties were, one of them was Oscar, the deceased.

Notwithstanding this injunction and the appellant's notice and knowledge thereof, some ten days to two weeks before the killing, he removed from the home place and sold and delivered several head of these hogs and received pay therefor. A few days after this sale his wife and Oscar were informed of it. On Monday morning, June 20, preceding the killing the following Thursday, June 23rd, appellant was fully informed that his wife and son Oscar were investigating his sale of these hogs and in fact, they met him at the home of his niece to whom he had sold the hogs and he then knew that his wife and son were proceeding to Center, the county seat, to lay the matter before their attorney for the purpose of proceeding against him to have him punished for selling said hogs in violation of said injunction. Just after this meeting with his wife and son, he left the home of his niece and went near to his own home to Mrs. Sanford's, where he was boarding and on this same day, Monday preceding the killing Thursday, he told Mrs. Sanford that his wife and son had been up to his niece's investigating his sale of the hogs to her and further said to Mrs. Sanford that they were fixing to put him in jail about it; that he had found that out and that Oscar was to blame with it and the one most in the business and he asked her, "Why does he not stay at home and attend to his own business and

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let my business alone?" And further said, "Well, I am going to put a stop to it right now."

It was further shown that Oscar and his mother, after meeting appellant at appellant's niece's, went on to Center, saw their attorney, discussed with him about apellant having taken and sold said hogs and their attorney agreed to prepare and did prepare and send to them the next day an affidavit for Mrs. Powdrill to make proceeding against appellant for violating the said injunction in the sale and disposition of said hogs. The notary in the neighborhood lived about one mile north of the Powdrill place and was in the mercantile business there also. Just after noon on Thursday, June 23, 1910, the day of the killing, appellant passed his home going to this notary's store, walking and carrying a gun. Some of his children saw appellant pass the house going towards this store and notary. Shortly after this, Oscar, who lived some few miles distant, drove to his mother's home in a buggy, accompanied by his wife and baby. His wife and baby at once got out of the buggy and Mrs. Powdrill and her són Oscar got in it and drove from there to said notary's store. They were accompanied by another son of appellant riding horse-back. Before they reached this store and notary, they passed appellant going in the same direction. No conversation is shown to have occurred between any of them, except between appellant and his younger son riding horse-back. The mother and two sons, upon reaching the store and notary, produced the affidavit which Mrs. Powdrill signed and swore to before the notary whose name is J. C. Walker. This affidavit was introduced in evidence and after reciting the granting of the injunction in the divorce proceeding prohibiting him from selling any of the property belonging to plaintiff and defendant and that he was duly served therewith, stated that he failed to obey the injunction, but on June 15, 1910, sold and disposed of thirteen head of the hogs belonging to them in violation of said writ. Just after Mrs. Powdrill and the notary had concluded this business, Mrs. Powdrill and her sons left his store, going across the street to another store in the little town called Arcadia and just as they went out of his store, appellant came into it. Mrs. Powdrill had left this affidavit with the notary with instructions for him to mail it to her attorney at Center and he agreed to do so. When appellant walked into the store of the notary he had his double-barrel shotgun with him and said to the notary he wanted to see him as soon as he got through, he then being engaged in waiting on a customer. In three or four minutes the notary finished and appellant met him in the back part of his store and wanted to know what his wife and sons were there for. The witness tried to avoid telling him, but by the appellant insisting and asking him if they were not fixing up some papers about some hogs the witness told him that was their business. Appellant then asked witness to write a letter for him to his, appellant's, attorney at Center. The witness insisted upon the appellant going to see his attorney, but

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he claimed that he had made an engagement to take some children to a masonic dinner the next day. Appellant then asked the witness for loaded shells and wanted those loaded with the largest shot he had and then purchased from the witness a box of the largest shells he had. Mrs. Powdrill and her sons had then left Arcadia returning to her home. As soon as appellant bought the box of loaded sheels from the witness, he did not wait to go out the front door,—the way he had come,—but jumped out of a side door, without steps, some four feet from the ground. This witness Walker further testified that upon appellant insisting upon knowing what his wife and sons had done, he told him they were there fixing up some papers against him charging him with selling some hogs and violating the injunction. In talking to the witness at this time, appellant's voice trembled and he seemed to be mad and vexed during all that time; he seemed to be very much bothered and his face was red.

On his way to Arcadia, when his wife and two sons passed him, he stopped at the house of his niece, just long enough to exchange guns; he stopped at the same place returning from Arcadia just long enough to tell his niece that he had to go to Center to see his counsel that evening and that he would get back late at night and to fix a bed for him; she had only a few words with him, did not notice anything wrong with him then and noticed nothing out of the ordinary. He left her house going towards Mrs. Powdrill's taking a gun with him. In a few minutes thereafter he appeared at his home. His wife and some of his daughters and his other children were on the gallery in the front of the house. Appellant was walking fast; he came up in front of the gate where his wife and daughters were and asked if the hogs were bothering them; one of his daughters replied "no, sir." He then said, "I allowed they were; I heard you all dogging them; I will get the rest of them up and sell them as you have been accusing me of selling them." All this time he was walking, but not fast. Several of his daughters, who saw and heard this testified that he seemed to be mad. They could tell it from his actions and what he said.

Upon leaving Arcadia Mrs. Powdrill and her two sons went directly back to her home. Oscar at once took his horse out from the buggy, put the plow harness on him, picked up a plow and a hammer, put the plow on his shoulder and led his horse on down through the farm and some gates to his field of corn for the purpose of plowing. It was in a very few minutes after this that appellant appeared on the scene. His daughters testified that they could always tell when he was mad; that when he was, he cleared his throat in a certain way and walked and went in a hurry, went fast when he went anywhere. When he first reached the house he proceeded around the corner of it like he was going to the barn and lot apparently then looking for his son Oscar. Not seeing him, because his son had just immediately before gone on to the field, he proceeded in that direction rapidly.

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In a very few minutes all of his children heard two gun shots fired in rapid succession. Two of his sons were working in a field only a very short distance from where Oscar was then killed. Trees, a plum thicket and other things, obstructed the view of these two sons and of his daughters at his house so that, although the distance from them respectively to Oscar was short, none of them could see either Oscar or appellant at the time Oscar was killed. Immediately after the two gun shots were fired all of his children hurriedly went to where Oscar was. Just before reaching him they met their father returning from where Oscar was found and one of his sons said to him, "Well, you have killed him at last." He replied, "I have killed him, but he ran on to me with his knife and you can come and kill me if you want to," and thereupon threw down his gun, they thinking at first that he was going to assault them, but instead he offered the gun to them. They told him that they did not want to harm him and for him to go on, which he did. They immediately proceeded to where Oscar was and found him dead. One gun shot had struck his left arm almost severing it from his body and some of the shot evidently from that fire of the gun had also glanced the fingers of Oscar's right hand. The other shot struck Oscar just under the left arm-pit and went entirely through his body, coming out on the opposite side just below the right arm-pit. Without detailing the evidence as to the immediate surroundings, the physical facts authorized the jury to believe that appellant killed his son without his son knowing anything about it. In fact, waylaid and assassinated him. It seems that while some of the witnesses endeavored to track appellant from the house where he had had the little conversation with his children to where he stood at the time of the killing, they could not track him. However, they did clearly track him away from there. As we understand the record and the evidence, the tracks indicated that appellant was several steps away from the deceased at the time he killed him. They were not in or about the path or trail close to the fence where the deceased had his horse and carried his plow and hammer. Deceased's large pocket-knife was found a few steps away from where his body was found covered up in the sand. Just under the body was found a freshly cut twig which was fitted to and shown to have been cut from a twig near where the body was found. The physical facts and the evidence clearly satisfies us, and the jury found that deceased did not attack appellant with his knife and that the appellant did not kill him in self-defense.

The evidence shows that, after appellant assaulted, attempted to get his gun to shoot Oscar and kicked and cut him in November, 1907, that they afterwards became friendly. The testimony does not reveal that there was any specific reconciliation between them but it does show that the deceased perhaps stayed at his father's some months after the reconciliation between appellant and his wife but that shortly afterwards the deceased married and did not thereafter

live with his father and mother. His father, in the early part of 1910, let his son Oscar have some land on his farm to raise a crop which he was doing at the time he was killed and that from time to time his father let his son have his, the father's, wagon to haul. The evidence does not disclose that they were at all any time afterwards cordial with one another. It, however, does not show any further breach between them until the second separation between appellant and his wife. All this was before the jury.

When the State offered proof by appellant's son and daughters of the difficulty between appellant and his son Oscar in November, 1907, at the time shown by the statement above when appellant assaulted, kicked and cut his son, the witness was asked what the occurrence was and what caused it. The appellant objected that the question called for a conclusion of the witness and stated that the witness could state what occurred and that it was all right. The court then directed the witness to tell what he saw and heard at that time. Then the appellant objected to the details of the difficulty. The witness was then permitted to state merely and briefly what was said and done then to the effect that when the son came home and found his mother gone, he asked his father what that meant and his father replied that it was none of his (deceased's) damn business, and then tried to assault him with the gun, but was prevented and thereupon kicked his son Oscar, cut him with a knife, and ordered him off the premises and the son at once left. The court did not permit the details of this difficulty to be gone into. This testimony was clearly admissible to show the hostility entertained by appellant for his son.

Appellant also objected to the State proving the several threats made by appellant against deceased shown above in the statement of the evidence. This was objected to on many grounds,—among them, that a reconciliation had afterwards occurred between them, between the time these threats were made and the killing and that the threats were too remote to be introduced in this case.

We had occasion recently in the case of Leech v. State, 63 Texas Crim. Rep., 339, 139 S. W. 1147, to investigate and pass on this question. Some of the authorities are cited in that opinion. Clearly all of this evidence was admissible.

Appellant also objected to the introduction of the proof about the original suit for divorce in November, 1907, and that of February, 1910, and the affidavit made by appellant's wife charging him with the violation of the injunction and proceeding thereby against him to have him punished for violating the injunction. It is unnecessary to recite these matters in full or the various objections made thereto. Only so much of these proceedings were introduced as were pertinent to show that the divorce proceedings had been begun; that appellant had been properly enjoined from disposing of any of the property, including the hogs specifically, and the affidavit of Mrs. Powdrill

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to the effect that he had disposed of these hogs in violation of the injunction and thereby beginning proceedings against him to punish him for contempt for violating the injunction. None of the recitations other than to show these facts were permitted to be introduced by the court on the trial and only so much as was clearly shown to be permissible under the previous decisions of this case was admitted. There was no error in this.

One of appellant's main complaints is to the charge of the court on manslaughter; among other things, that cooling time in connection therewith was not charged and many other complaints thereabout: We have thoroughly considered this matter and the evidence in this case and in our opinion the evidence in no way called for a charge on manslaughter. The evidence neither shows, nor tends to show sudden passion, nor adequate cause, both of which are absolutely essential to require a charge on manslaughter. Every fact and circumstance in the case, shown by the proof and without controversy at that, shows that in November, 1907, when appellant had a disagreement with his wife and it seems drove her away from home and would not permit her to return, when his son reached home after an absence and merely asked what it meant, his father resented his inquiry, attempted then to shoot him and did actually commit an assault and battery upon him by kicking him, cutting him and ordering him from his place, and then told him that if he caught him monkeying with his business any more he would kill him. The next morning he told his son Bob that if ever Oscar meddled with his business any more he was going to kill him. On that same day he told Frank Patterson that if Oscar did not quit meddling with his business he would kill him and on the morning after he had assaulted Oscar, as stated above, he told Bud McKenzie that he "like to have killed Oscar" the night before and if he came there cutting up any more he would kill him. About the last of April or first of May, 1910, he told Mr. Sanders that Oscar was taking up for his mother in his, appellant's, domestic matters and trouble with his wife and that Oscar was taking up for his mother and prying into his domestic affairs and if he kept it up he was going to kill him. Some two weeks before he did kill his son, he told Mr. Adams about his trouble with his wife and that if things didn't change hell would be to pay. On Monday before he killed his son on the following Thursday afternoon he knew that his wife and son were investigating the sale by him, in violation of the injunction, of said hogs, and that Oscar was assisting his mother in the investigation and proceeding against him at that time. He saw his son and his wife on that occasion and knew what they were doing. He then went to where he was boarding and on the same day told Mrs. Sanford with whom he boarded, that his wife and son Oscar were fixing to put him in jail because of his having sold said hogs, and he then said to her in substance that Oscar had a wife and child and business of his own to attend to and re-

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marked, "Why don't he stay at home and attend to his own business" and let his (appellant's) business alone, and that he was "going to put a stop to it right now." He seems to have kept up with the matter fully and followed his wife and son to Arcadia where they made the affidavit against him, and demanded of the notary if they had not proceeded against him, and when informed that they were proceeding against him because of the violation of the injunction and selling the hogs, he was mad, then had a gun with him, procured ammunition, left hurriedly, and hastened on, hunting for and trailing down his son and in a few minutes after he was informed by the notary that his wife and son had been there and prepared the affidavit against him, proceeded, as we believe, to waylay and assassinate his son, showing a hostility to his son and threats continued from November, 1907, till the evening of June 23, 1910, and then killed him for the very reason that he had threatened to kill him from November, 1907, continuously up to the very time of the killing. That express malice instead of sudden passion is thus established, and sudden passion is positively disproved.

There was no adequate cause. The son had the perfect right,—and as between the father and mother, as shown by this record, it was his duty,—to aid her in the investigation of the appellant's wilful violation of the injunction against him and the appellant, having wilfully violated the injunction, the proceeding against him therefor, even if it had been by his son alone and not by the son merely aiding and assisting his mother, could be and under no circumstances would have been adequate cause. Redman v. State, 52 Texas Crim. Rep., 591.

Appellant contends that he killed his son in perfect self-defense. As stated above, upon a consideration of all the facts and the physical facts, it is our opinion that this was unquestionably and beyond doubt clearly disproved. But upon his theory and claim, it is the well established law of this State that where the case presents either murder or perfect self-defense, it is not error to fail to charge on manslaughter. Some of the decisions on this point are collated and cited in Treadway v. State, 65 Texas Crim. Rep., 208, 144 S. W. Rep., 655. It is needless to cite or comment upon them herein.

In the former decision of this case we did not pass upon, nor were we called upon to pass upon, the question of whether or not a charge on manslaughter was called for at that time as the record was then presented to us. The case was reversed upon another ground and as appellant was complaining of some feature of the charge on manslaughter and not knowing what the evidence would be upon another trial, in the opinion on the former appeal we merely called attention to the fact that a complaint was made to the charge on manslaughter because it did not submit affirmatively, instead of negatively only, such question and we said therein: "This criticism may be correct and the court on another trial can so charge as that this criticism can

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not be correctly made." With reference to the complaint on the former appeal that the court ought to have charged on cooling time with reference to manslaughter, we merely said: "These matters can be properly charged, if the evidence raises them, on another trial of this case." Besides this the court gave a charge on manslaughter in appellant's favor on the only possible theory suggested by the evidence.

Among other complaints by appellant of the charge of the court in this case is, that because the State introduced appellant's res gestae statement to his children immediately after he had killed his son Oscar that he "had killed deceased but that deceased was coming on him with a knife," that the court should thereupon have instructed the jury that they could not convict appellant because of the proof of this res gestae statement, unless they found said statement to be untrue beyond a reasonable doubt, and cites Pharr v. State, 7 Texas Crim. App., 472, to sustain this contention. The State in reply to this contention of appellant, claims that the court did not so err, because the res gestae statement was not an admission or confession by appellant, but was a part of the res gestae of the transaction and because the State had ample and sufficient evidence other than this res gestae statement upon which to base a conviction, and that as the court had fully submitted the question of appellant's guilt of murder in the first and second degree and required that before they could convict him of either of these degrees of murder that they must find him guilty beyond a reasonable doubt, and that if the appellant wanted any further charge on the subject it was incumbent upon him to request it. A careful consideration of the charge in this case convinces us that as the case was submitted it clearly required the jury to believe,—not in express terms,—but clearly in effect, that they must believe beyond a reasonable doubt that appellant did not kill the deceased in self-defense but with express malice aforethought, and thereby covered everything on this point that could have been required. Besides, we believe that the State's contention in reply to appellant on this point is correct. Slade v. State, 29 Texas App., 381, 16 S. W. Rep., 257; Jones v. State, 29 Texas Crim. App., 20; Trevenio v. State, 48 Texas Crim. Rep., 207, 87 S. W. Rep., 1162; McKinney v. State, 49 Texas Crim. Rep., 591, 88 S. W. Rep., 1012; Tidwell v. State, 47 S. W. Rep., 466.

The court in the charges on murder in the first and second degrees sufficiently and clearly charges on cooling time, a sedate mind, etc., so as to clearly present these two degrees of murder. It was altogether proper for the court to limit the purpose as it did for which the jury could consider the divorce proceedings before them and the first difficulty between appellant and his son in November, 1907.

Neither did the court err in submitting to the jury for their finding whether or not appellant approached deceased to discuss with him at the time of the killing his family troubles and the contempt pro-

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ceedings against him for violating the injunction. While there was no direct evidence on this point, the evidence did by circumstances evidence some such questions so that the court's charge thereon was not reversible error. Besides, it was all clearly in appellant's favor and not against him, so that he could not have been injured thereby.

Appellant has many complaints of what he claims are omissions in the charge of the court, as, for instance, on various phases of cooling time and not submitting a specific requirement in the court's charge that the State must disprove appellant's res gestae statement that he killed deceased because he was coming on him with his knife and that, as a reconciliation between father and son had occurred after their difficulty in November, 1907, and appellant's belief about his son's siding with his mother in the divorce suit and in her attempt to have him punished for violating the injunction and such like matters. We have considered all these matters and none of them present any error. The appellant requested no charge on any subject. Upon a careful and thorough consideration of the charge of the court, it is our opinion that it embraces properly every matter that is raised by the evidence and that there is no omission therein that in any way resulted to the injury of the appellant. It is true as contended by appellant that Article 735 (715) Code Criminal Procedure requires the court to distinctly set forth all the law applicable to a case. Yet, Article 743 (723) Code Criminal Procedure was amended so as to prevent this court from reversing a case even though all the law had not been set forth as called for by Article 715, "unless the error appearing from the record was calculated to injure the rights of the defendant." In our opinion no such error of either omission or commission, as would authorize this court to reverse this case, appears.

The judgment is, therefore, affirmed.

Affirmed.

[Rehearing denied February 5, 1913.—Reporter.]

DAVIDSON, PRESIDING JUDGE (dissenting).—I did not participate in the decision in the case when it was originally handed down, not being present. I was present, however, when the motion for rehearing was overruled. That I may not be regarded as consenting to the affirmance of the case and the manner in which it was affirmed, I will make a few observations by way of dissent.

The case shows clearly, as found in the transcript of the evidence, that in 1907, appellant's wife sued him for a divorce. The deceased, the eldest son of appellant, took an active part with his mother against the appellant in that matter. That suit was brought in 1907, but was dismissed. A reconciliation occurred between the parties and continued until 1910, when another suit for divorce with injunction proceedings was filed by the wife against appellant. Appellant about two years before the homicide had some trouble with the deceased but subsequently a reconciliation occurred between the father and his

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deceased son. I cannot agree with my brethren that the reconciliation did not occur for the State's evidence and all the evidence shows clearly that it did. The facts show that some time before the killing, appellant gave his son, deceased, a horse, saddle and bridle when the latter was leaving home, going out in the western part of the State on some character of mission. Deceased was gone awhile, returning to his father's home, having disposed of the horse, saddle and bridle, and without anything. In other words, he was in a poverty stricken condition and began work on the railroad. During this time he was living with his father and mother and worked on the railroad until he was married about two years before he was killed. He then lived with his uncle, R. H. Powdrill, a short while when his father placed him on a farm, free of rent, and aided him in the cultivation of said farm, loaning him his wagon and team. Deceased continued to live on this farm, free of rent, until he was killed. He also worked a portion of his father's farm, free of rent, and was working that portion of his father's farm when he was killed. In January or February before the homicide appellant employed an attorney, Hon. S. H. Sanders, to defend the deceased in a case pending in court against the deceased and paid the lawyer his fee for defending his son. A daughter of the deceased, used by the State, testified: "My father rented the cotton ground to Oscar before the separation and gave him permission to plant a cane patch free of rent." The separation here spoken of was the last separation before the homicide. Bob Powdrill, a brother of the deceased and son of appellant, testified in this connection: "On Tuesday night after my father had come back from Henderson County on Monday, he and Jim and I and others started out on a serenading expedition, but after going a part of the way, we turned back and did not go and we all came back together as far as the road opposite our house and there we parted. My father went towards Mrs. Janes, and Jim and I went home. I did not tell my father what we had done at Center and what we intended to do. On the occasion of the serenade my father laughed and joked with us and was pleasant towards us and when we passed him on the road when we went to Arcadia he joked about some stirrup leathers. When my father came into the store at Arcadia he was apparently in as good humor as he was when he asked me about the stirrup leathers. I could not tell any difference." It was at Arcadia only a short time, within an hour or such a matter of the homicide, that appellant ascertained the fact of the contempt proceedings and that this conversation occurred between Bob Powdrill and his father, the appellant. Mrs. Bishop, daughter of appellant, testified: "When Oscar was first married he lived at Uncle Dick Powdrill's and afterwards went on the place my father had charge of. My father put him on that place free of rent. I have seen my father up there helping Oscar at work, cleaning up. That is to say, I have heard him say that he was going up there to help

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Oscar. My father had a good wagon and team and Oscar did not have any, and I have seen Oscar use my father's wagon and team. I do not remember anything about my father helping Oscar out of his trouble with old man McCray. Oscar had been married about two years when he was killed." Attorney Sanders testified: "I had represented Oscar Powdrill at Mr. Powdrill's request in some matters he had in court and Mr. Powdrill paid me the fee for representing Oscar. When I represented Oscar at the instance of Mr. Powdrill, for which Mr. Powdrill paid me the fee, this was some time in January or February, 1910, before he made the statement to me in April or May." Mrs. Ella Harris also testified to the same effect as the other witnesses, showing an entire reconciliation between the parties.

I do not care to go into details but I make the above statement as coming from the record which shows there had been a reconciliation between the parties. It is also manifest from the record, not only that there had been a reconciliation, but that up to within a very short time, perhaps within sixty minutes, or even a short space of time, that appellant was in a laughing, joking, humorous condition of mind and had not anticipated the serious results that followed so shortly. Upon ascertaining the fact that his wife and deceased had made affidavits for contempt proceedings against him, appellant became angered and outraged. His wife and the deceased had returned home, a short distance away. Appellant got his gun and went to the field where deceased was, and the killing occurred. Some of his children ran down to the field close by where they were living and met their father. This was within five minutes after the homicide, and remarked to him, "You have killed Oscar." He said, "Yes, I had it to do" as Oscar was coming upon him with a knife for the purpose of killing him. The ground was investigated at the scene of the killing and a very large knife was found near the body. This is uncontradicted testimony.

1. All of the proceedings in court were introduced in evidence by the State, over objections of appellant. This included the petition for divorce, injunction, affidavit, etc. I do not care to make a further detailed statement. The record is voluminous and it could serve no useful purpose as to what I may have to say. From the above, under the authorities in this State, I am of the opinion that the prior troubles had been two or three years before the homicide and which had all subsided and about which the parties were all reconciled, should not have gone before the jury. But if I am incorrect on that proposition, then unquestionably the law would require that the court limit the consideration of the jury to the latter provocation to the exclusion of the first. This has been decided as late as the case of Mayhew v. State, 65 Texas Crim. Rep., 290, 144 S. W. Rep., 229. See also McCoy v. State, 25 Texas 33. There ought to be no controversy on this proposition.

2. It may have been proper to introduce before the jury the fact

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that the later divorce proceedings were pending in court and the deceased was instigating his mother to do what she was doing in that connection as bearing upon the question of motive. It seems that appellant grew enraged on account of the affidavit that the mother had made at the instigation of deceased for the contempt proceedings, and in a very short time committed the homicide, but the details and pleadings and averments of all those proceedings were not admissible, in my opinion.

3. It is clearly shown that the homicide grew out of making the affidavit for contempt proceedings within an hour of the homicide. This required the court to limit the jury in their consideration of the law and the facts in connection with that, without reference to the former trouble, which occurred about three years previously. And in this connection I would say, both on the facts and the law, appellant's conviction could not have been for a higher offense than murder in the second degree from the State's standpoint. It is the universal rule that where the purpose to kill is formed in an inflamed and excited condition of mind the offense is no higher than murder in the second degree, if the design is executed before the mind becomes sedate. Where a sufficient time has not elapsed for the mind to cool, the homicide would be no higher than murder in the second degree. The authorities are without any exception on this point. There have been quite a number of recent cases on this proposition of law, sustaining it, as I have stated. The court, therefore, should have limited the consideration of the jury, so far as murder is concerned, to murder in the second degree and the facts, in my judgment, do not sustain from the State's standpoint, a higher offense than murder in the second degree.

4. When the State introduced in evidence the declaration of appellant that he had shot his son in self-defense, as shown by the State's witnesses, it was incumbent upon the State to prove that statement false in order to secure a conviction of any grade of culpable homicide. This phase of the law should have been distinctly charged to the jury. Pharr v. State, 7 Texas Crim. App., 472; Combs v. State, 52 Texas Crim. Rep., 613; Pratt v. State, 53 Texas Crim. Rep., 281; Winkler v. State, 58 Texas Crim. Rep., 564.

There are many other questions in the case, suggested for reversal, of more or less merit. I have briefly stated these propositions without amplifying them. To cover all the questions it would take a voluminous opinion and would serve no practical purpose, so far as this case is concerned, inasmuch as the motion for rehearing has been overruled, and the case made a finality. I have briefly written what I have written in order to suggest that I cannot agree with the opinion which, in my judgment, practically overrules a great number of decisions without even discussing them, and this on several questions. This conviction, under this record, ought not to be affirmed.

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Vall Staha v. State.

No. 2075. Decided November 27, 1912.

1.—Theft—Conflicting Testimony.

Where, upon trial of theft, the testimony was conflicting, but sufficient to sustain the conviction, there was no error.

2.—Ownership—No Variance—Custody Not Control.

Where the information charged the ownership of the automobile from which a generator was taken to be in the owner of the automobile who had the same in a garage owned by another who had the mere custody of the automobile, the ownership was correctly alleged. Following Thomas v. State, 1 Texas Crim. App., 289, and other cases.

Appeal from the County Court of Lavaca. Tried below before the Hon. P. H. Green.

Appeal from a conviction of theft; penalty, a fine of $5 and twenty days confinement in the county jail.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State. Otero v. State, 30 Texas Crim. Rep., 450.

DAVIDSON, Presiding Judge.—Appellant was convicted of theft, his punishment being assessed at a fine of $5 and twenty days imprisonment in the county jail.

There are two theories in the case, one showing criminality, and the other showing innocent possession of the property appellant was charged with taking. We deem it unnecessary to go into the statement of facts to collate the evidence pro and con on this question.

It is contended that the evidence does not support the allegation in the information, that Ragsdale was the owner of the property. The property taken was a generator from an automobile. It was in the garage belonging to a man whose name was Drozd, and appellant had an automobile in the same garage, which seems to have been in a bad condition, and was sold to him as a worn out vehicle. It did not have a generator. Appellant went in the garage at night after his auto, which he had a right to do, and hauled it out. When in there he says he picked up the generator lying on the ground, thinking it belonged to his machine. The evidence for the State, on the contrary is, that it belonged to Ragsdale's machine and was lying over on his machine, and not where appellant claimed it was. There is testimony also that appellant sold the generator to another party. Drozd was in charge of the garage and it belonged to him, and the Ragsdale machine was in this garage. It seems that when Ragsdale was not using the machine he kept it there. The contention is that this made Drozd the owner of it, having care, custody and control. We do not believe this position is sound under the authorities. Mere

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custody as this was does not constitute that character of control, care and management that constitutes ownership or authorizes the allegation of ownership for want of consent, etc. See Branch's Crim. Laws of Texas, sec. 785. Mere custody is not possession. Thomas v. State, 1 Texas Crim. App., 289; Garling v. State, 2 Texas Crim. App., 44; Bailey v. State, 18 Texas Crim. App., 426; Clark v. State, 23 Texas Crim. App., 612; Hawkins v. State, 20 S. W. Rep. 830; Graves v. State, 42 S. W. Rep., 300; Willis v. State, 44 S. W. Rep., 826; Odell v. State, 44 Texas Crim. Rep., 317; Byrd v. State, 49 Texas Crim. Rep., 279; King v. State, 100 S. W. Rep., 387; Bryan v. State, 4 Texas Crim. App., 59; Russell v. State, 55 Texas Crim. Rep., 330.

The most that can be said, we think, of the possession of the owner of the garage was, that he was the custodian of the machine; that he in no sense had any care, control or management of it such as to constitute him the owner of it in law in theft cases. Neither he nor Mr. Ragsdale testified to any such ownership. It seems from Ragsdale's testimony that when he was not using the machine he kept it in this garage as protection against the weather, etc. There is no fact indicating that he ever turned over this machine to be handled, used and controlled by the owner of the garage. It was just there on account of the convenience and protection of it for Mr. Ragsdale, the owner.

We are of opinion there is no such error in this record as requires a reversal of the judgment, therefore, it is ordered to be affirmed.

Affirmed.

JOHN PUGH V. STATE.

No. 2034. Decided November 27, 1912.

1.—Murder—Sufficiency of the Evidence.

Where, upon trial of murder, the defendant was convicted of murder in the second degree which was sustained by the evidence, and the charge of the court, there was no reversible error.

2.—Same—Evidence—Eyewitnesses—Common Law.

Under the common law, a rule of law was sanctioned where, by motion filed, the defendant could require the State to introduce all eyewitnesses to the transaction, but this is not the rule under the statutes of this State.

3.—Same—Motion to Strike Out—Bill of Exceptions.

Where no bill of exceptions, to the motion to strike out testimony, was reserved at the time to the court's ruling in refusing to do so, there is nothing to review; besides, there was no error in refusing to do so.

4.—Same—Practice in District Court—Eyewitnesses.

Where the court refused to require the State to place all eyewitnesses on the stand, but on his own motion, called a witness on the stand and tendered him to both parties who examined him rigidly, there was no error; besides, the State did not wholly rely on circumstantial evidence, but introduced an eyewitness to the transaction. Qualifying Hunnicutt v. State, 20 Texas Crim. App., 632; Thompson v. State, 30 Texas Crim. App., 325. Following Reyons v. State, 33 Texas Crim. Rep., 143, and other cases.

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5.—**Same—Charge of Court—Self-defense.**

Where, upon trial of murder, the State's case was sustained by its testimony, and defendant's case was one of self-defense, both of which theories the court fully submitted to the jury, who convicted the defendant of murder in the second degree, there was no error.

6.—**Same—Requested Charges.**

Where some of defendant's requested charges were submitted and others were refused because not applicable to the testimony, there was no error.

7.—**Same—Charge of Court—Limiting Testimony.**

Where the State only asked questions to lay a predicate to impeach the witnesses, but did not follow it up by offering any testimony, there was no error in the court's failure to limit such questions; besides, the court instructed the jury on the impeaching testimony of other certain witnesses and properly limited the same, and there was no error.

8.—**Same—Charge of Court—Self-defense—Manslaughter.**

Where, upon trial of murder, the court properly instructed on the issue of self-defense, and the evidence did not raise the question of manslaughter, there was no error in the court's failure to charge thereon.

Appeal from the District Court of Houston. Tried below before the Hon. B. H. Gardner.

Appeal from a conviction of murder in the second degree; penalty, five years imprisonment in the penitentiary.

The opinion states the case.

J. W. Madden and *C. M. Ellis,* for appellants.—On the question of the insufficiency of the evidence: West v. State, 2 Texas Crim. App,. 460; Walker v. State, 3 id., 70; Walker v. State, 14 id., 609; Templeton, 5 id., 398; Jones v. State, 7 id., 457; Lander v. State, 12 Texas, 462; Ridout v. State, 6 Texas Crim. App., 249; Ward v. State, 30 id., 687; Williams v. State, 2 id., 271; Cochran v. State, 28 id., 422; Anderson v. State, 1 id., 730; High v. State, 26 id., 545; Phillips v. State, 29 Texas, 226; Skaggs v. State, 31 Texas Crim. Rep., 563; Ake v. State, 31 Texas, 416.

On question of introducing eyewitnesses by the court: Chamberlain v. State, 25 Texas Crim. App., 398; Odle v. State, 13 id., 612; Smith v. State, 15 id., 338; Parker v. State, 18 id., 72.

On question of the court's charge: Ward v. State, 30 Texas Crim. App., 687; Skaggs v. State, 31 Texas Crim. Rep., 563; Hall v. State, 66 S. W. Rep., 783.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was indicted, charged with murder, and convicted of murder in the second degree, and his punishment assessed at five years confinement in the State penitentiary.

In appellant's first, second, third, fourth, fifth, sixth, twenty-first, twenty-second, and twenty-third assignments of error is presented the question of the sufficiency of the evidence to sustain the verdict, in some of them it being alleged that the evidence is insufficient to sus-

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tain the verdict, and in others that the verdict is contrary to the law as given in charge to the jury. Appellant groups them in his brief, and we do so, for if either present grounds of reversal, the whole case must fall.

That appellant killed the deceased is not denied, but it is earnestly insisted that the killing was done under such circumstances that he was justifiable as a matter of law. It appears that deceased was a constable of a precinct in Houston County, and had detected appellant, with others, gambling, and reported them. On this occasion appellant refused to submit to arrest. Later when tried, appellant had a fight with the deputy sheriff about his fine. Between the time of appellant's detection in the gambling game and this killing, appellant was heard to remark that he had two shells in his gun, one for deceased and the other for the deputy sheriff. On the day of the killing appellant used very abusive language, and made threats about what he was going to do to deceased. This, of course, is all from the State's evidence, and the truth of which was passed on by the jury, and we mention it solely on the ground of whether or not the testimony was sufficient to sustain the verdict, and whether the verdict was contrary to the charge of the court. After making these threats, it is shown by John Bobbitt that he was present at the time of the shooting, and he says: "The shooting was done in Jake Gregg's store house in Weeches, Houston County, Texas. I don't know what time of day it was, but it was late in the evening, after the noon hour and before dark. I do not know what caused the trouble, and the first I do know about it I was sitting on a counter in Jake Gregg's storehouse and I heard Jim Robbitt, my brother, tell Luther Show to turn him aloose, and I looked up that way and John Pugh was coming down the aisle and I started up there to where Jim Bobbitt was, and I passed John Pugh and John Pugh went in behind the counter and I taken hold of Jim and me and him started on to the front door, and just as we got a little past the counter I heard a gun cock and I looked back that way and seen the gun coming up over the counter in that position, and I just spoke to Jim and said, 'Jim, look out' or 'Look there' or something to that effect, and Jim kind o' turned his head that way and as he did so the gun come on up, and as it did, I thought he was going to shoot him and I turned my head away and made a step, but he didn't shoot him and I turned back, and as I turned back the gun shot and Jim was falling."

Harvey Smith testified: "He (John Bobbitt) wasn't standing when I saw him, and he wasn't sitting either; he was walking right behind Jim Bobbitt going towards the front door. I reckon they had passed what you would call the middle of the house; and they were going towards the front door. Both of them were facing me, and I was on the inside of the door. They were coming facing me, both of them. Jim Bobbitt was ahead and John Bobbitt was behind. They were on the left hand side of the house as you went in at the front

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door; coming up the aisle next to the counter on the left hand side of the house as you go in the front door. Then Jim Bobbitt was killed. John Bobbitt was right behind Jim Bobbitt. Jim Bobbitt was kind o' facing the door when he was shot, but he looked around towards the gun just as he was shot. I saw him when he looked around. I saw the gun when it fired. I don't know just how far he was from the gun, but I would guess two or three feet. I don't know how far he was from the front door, but he was something about twelve feet, I suppose.'' If the jury believed the theory of the State, based on the testimony of these two witnesses and other facts and circumstances in the case, appellant was not justifiable in the shooting, and the testimony would amply support the verdict of the jury.

The State introduced, in its original testimony, only John Bobbitt as to the facts and circumstances at the time of and immediately preceding the killing. When the State rested the defendant filed a motion asking that the State be required to introduce all the eyewitnesses to the transaction. This motion was by the court overruled, and of this ruling of the court appellant complains in his eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth assignment of error. Under the common law, as the defendant could not introducc any testimony, a rule of law was sanctioned where by motion filed, the defendant could require the State to introduce all eyewitnesses to the transaction. In this State there has never been any reason for such rule, and it has never prevailed. When the State has closed its testimony, a defendant can introduce such testimony as he desires, and such of the eyewitnesses as the State does not introduce he can call if he desires to do so.

In his sixteenth, seventeenth and eighteenth assignments of error appellant complains of the action of the court in overruling his motion to strike out all the testimony adduced down to the time the State closed its case. If such motion was made, no bill of exceptions was reserved to the action of the court in refusing to do so, consequently the matter is not presented in a way we can review it. However, if it was properly presented, under Article 698 of the Code of Criminal Procedure this court has held that the trial court has a wide discretion in the order of admitting testimony. The testimony of the other eyewitnesses was relied on by appellant to prove that he acted in self-defense, and it would not have been proper for the court to have required the State to introduce this testimony, and vouch for it. The court in this instance stated to appellant he would not require the State to place the witnesses on the stand, but if it was desired the court would place the eyewitnesses on the stand, thus relieving the defendant of the burden of vouching for them, and the court did place Shaw on the stand, and tendered him to both the State and defendant, and this witness did testify, being rigidly examined both by the State and defendant. The court in so doing

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evinced a spirit of fairness, and his action is not subject to criticism in this respect. Appellant cites us to the cases of Hunnicut v. State, 20 Texas Crim. App., 632, and Thompson v. State, 30 Texas Crim. App., 325. In the Thompson case it was held that if the State undertook to make its case wholly by circumstantial evidence, it would be proper to require the State to introduce some of the eyewitnesses. In this case the State did not rely wholly on circumstantial evidence, and did introduce one eye witness, and the way he detailed events at the time of the killing is wholly at variance with the testimony of the other eyewitnesses, and yet the jury seems to have accepted his version. In the Hunnicut case Judge White is expressing his individual opinion and so states; and was not speaking for the court, and the views thus expressed never became the law of this State, the reason for the contrary rule being well expressed by Presiding Judge Davidson in the case of Reyons v. State, 33 Texas Crim. Rep., 143. See also McCandless v. State, 42 Texas Crim. Rep., 655, 62 S. W. Rep., 745; Mayes v. State, 33 Texas Crim. Rep., 33; Kidwell v. State, 35 Texas Crim. Rep., 264; Darter v. State, 39 Texas Crim. Rep., 40; Wheelis v. State, 23 Texas Crim. App., 238.

If the evidence offered on behalf of appellant had been believed by the jury it would have presented a case of self-defense. However, the court in his charge presents that question to the jury very favorably to defendant, and in addition thereto gave at appellant's instance the two following special charges:

"You are instructed that if you believe from the evidence in this case that the defendant and the deceased, Jim Bobbitt, had settled their troubles and differences by mutual agreement before the said Bobbitt was shot, and that the defendant had put his gun away in pursuance of said agreement, believing in, and acting upon the good faith of the said Bobbitt in making the said agreement, and that thereafter the said Bobbitt violated his said agreement and brought on further trouble between himself and the defendant by attacking the defendant and challenging him to further trouble by telling him to 'get his gun,' and that he pursued the defendant to where the defendant had put his gun, with his pistol in his hand, and that the defendant then shot the said Bobbitt under the belief that the said Bobbitt intended to kill him or inflict upon him serious bodily injury, then and in that case you will find the defendant not guilty. And in determining this question you will pass on the same from the standpoint of the defendant as the appearance of danger may have reasonably appeared to him at the time of the shooting, although you may believe there was no *real* danger of such injury.

"You are instructed that if you believe from the evidence in this case that at the time of the killing the deceased was the aggressor, and that he brought on the trouble between himself and the defendant in the house where he was killed, and conducted himself in such way as to lead the defendant to believe that he meant to kill the

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defendant, or to inflict upon him serious bodily injury, and that under such belief the defendant shot and killed the deceased, then and in that case you will find the defendant not guilty, and you will so find whether you believe there was any real danger or not, and whether any previous agreement to settle their troubles was made or not, and whether you believe the defendant had previously threatened the life of the deceased or not.''

Thus in two special charges the court directed the attention of the jury to the real issue in the case as made by the testimony offered in behalf of defendant. If, as the State's witnesses testify, deceased was walking away from appellant at the time he was shot, defendant was not justified in killing him. On the other hand the defendant's witnesses would have deceased raising the trouble at this particular time and pursuing appellant, and these charges tell the jury if they found these facts to be true, or had reasonable doubt thereof, to acquit him.

There was no error in refusing special charge No. 3, as it was covered in special charges Nos. 1 and 2, given at appellant's instance. There was no evidence calling for or upon which to base special charge No. 4. The court had told the jury if deceased was advancing on appellant with a pistol, to acquit him, and this was the theory of appellant on the trial, and there was no reason to instruct the jury whether or not deceased was acting in his official capacity.

In cross-examining several witnesses the State's attorney asked them if they had not testified differently on a former trial in this case, apparently laying a predicate to impeach them, but did not follow it up by offering any testimony to impeach them. Appellant complains that the court in his charge failed to limit the purposes for which such questions were asked and testimony would have been admissible. As no testimony was offered, we fail to see the necessity for the court to charge thereon. Where certain testimony was admitted for impeaching purposes the court instructed the jury: ''Certain witnesses for the State have been permitted to testify that certain witnesses for the defendant made certain statements at times and places other than on this trial. Now you are instructed that such testimony cannot be considered by you as proof of any fact against defendant, but same has been admitted in evidence on the issue as to the credibility of said witnesses for the defence on the weight to be given their evidence respectively and cannot be considered for any other purpose.'' It is thus seen that the court fully instructed the jury when any testimony was admitted.

The appellant earnestly insists that the verdict is contrary to the law as given in charge by the court; that if the evidence did not conclusively show he acted in self-defense, then the evidence would show no higher degree of offense than manslaughter. It appears that deceased was an officer, and as such officer had detected appellant gambling, and appellant was compelled to pay a fine. This angered

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him, and on several occasions thereafter he had used very abusive language in regard to deceased, and at all times carried a shotgun, saying he had as much right to carry it as the officers did a pistol. It is nowhere suggested or shown that the officer nutured any animosity towards appellant, but the animosity was wholly on his side. On the day of the killing appellant had become unruly on the base ball ground, and when requested to desist, used very offensive language, and threatened to take the life of deceased. From his standpoint, later when the officer went in the store and asked him if he had his gun, and he answered, nc, the officer telling him to get it, he made for his gun and shot the officer. He exhibited a disposition and willingness to enter into a deadly combat. The testimony offered by him would suggest mutual combat. If his theory is true, it is remarkable that the officer followed him, firing no shot, and under such circumstances we can readily see how the jury accepted the State's theory of the homicide—that when the trouble arose and appellant made for his gun, deceased and his brother, instead of following defendant, started out of the store and deceased was killed when there was no necessity or apparent necessity viewed from any standpoint.

The judgment is affirmed.

Affirmed.

HALLECK BELLEW, ALIAS BLUE BOY V. STATE.

No. 2038. Decided November 27, 1912.

1.—Burglary—Charge of Court—Accomplice.

Where, upon trial of burglary, the court's charge on accomplice testimony followed approved precedent, there was no error. Following Tucker v. State, 58 Texas Crim. Rep., 271.

2.—Same—Sufficiency of the Evidence.

Where, upon trial of burglary in the night-time, the evidence sustained the conviction, there was no reversible error.

3.—Same—Newly Discovered Evidence—Want of Diligence.

Where the motion for new trial showed a want of diligence in not procuring the alleged newly discovered evidence on the trial of the case, there was no error.

4.—Same—Appointment of Counsel.

Where the record on appeal did not show that the defendant requested or desired an attorney to be appointed by the court representing him on the trial, there was no error.

Appeal from the District Court of Briscoe. Tried below before the Hon. R. C. Joiner.

Appeal from a conviction of burglary; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

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J. E. Daniel, for appellant.—On question of the court's charge on accomplice testimony: Pace v. State, 58 Texas Crim. Rep., 90, 124 S. W. Rep., 49; Wadkins v. State, 58 Texas Crim. Rep., 110, 124 S. W. Rep., 960; Baggett v. State, 144 S. W. Rep., 1136.

On question of insufficiency of the evidence: Hamilton v. State, 11 Texas Crim. App., 116; Melton v. State, 24 id., 287; Edwards v. State, 36 Texas Crim. Rep., 387.

On the question of appointment of counsel: Valle v. State, 9 Texas Crim. App., 57.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—The appellant was indicted, convicted and given the lowest penalty for night-time burglary of a store belonging to one Fawcett.

It seems he had no attorney to represent him on the trial of the case in the court below until after his conviction. Why this was is not disclosed by the record. It does not show that he requested or desired an attorney to be appointed by the court to represent him on the trial.

After his conviction it seems he succeeded in procuring attorneys to file a motion for new trial for him. The attorneys who filed this motion are different from his attorney who now represents him on this appeal. The motion for new trial sets up only three grounds: first, that the paragraph of the court's charge on the law of accomplice is error in that it authorized his conviction if the testimony tended to prove the commission of an offense and his connection therewith; second, because the evidence is insufficient to show he had any knowledge that an offense was about to be committed on the night of the burglary, or that one had been committed until some time thereafter, and was not told by any of the guilty parties that an offense had been or was about to be committed, and it does not show that he participated in the commission of the offense; third, that he was not represented by counsel, and did not know how to bring out his defense, and he now tenders proof from the accomplice, Tal Watkins, that he knew nothing whatever about the commission of the offense, and that said Watkins would have so testified if he had been asked to do so.

The record shows that said Watkins testified on the trial. The court specifically charged that he was an accomplice. The charge is in almost literal compliance with that in the case of Tucker v. State, 58 Texas Crim. Rep., 271, which was specifically held correct in that case. We think the charge of the court on the subject is not fatally defective as claimed by appellant, and is in substantial compliance with the statute and the decisions on the subject.

The evidence is not very strong. The case seems, for some reason, not to have been fully developed. We have gone over it several times carefully, and, in our opinion, it was sufficient to justify the verdict,

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and this court would not be justified in holding otherwise. It sufficiently shows, that on the night charged, the storehouse of said Fawcett was burglarized and several pairs of gloves stolen out of it by the burglars at the time; that the house was by force actually entered by said Watkins and Dave Miller, they taking the gloves out of the house at the time and immediately taking them and putting them in appellant's buggy. He (appellant) had driven with these two persons up close to the back of this store, and waited there in his buggy until they went, broke into the store, stole from and brought and put in his buggy the stolen gloves. That those two persons then got in the buggy with him and he drove away from the store and the little town; that other boys on horseback, with whom these three persons had been with more or less during that night, also rode off following the buggy. That when they got about half a mile from the town they all stopped, one of the party took the gloves out of the buggy, distributed to each of them, including appellant, one pair thereof, and that one of them then took all the remainder of the gloves, and hid them in the trunk of one of the boys along with them that night. The next day when the offense was being investigated, he took the gloves out of this trunk and hid them under cotton seed hulls in a feed pen, where they were afterwards, together with those gloves that had been distributed to the various parties, including appellant, recovered. The owner of the store and his wife both testified that the property which was taken out of their store was without their knowledge and consent, and they specifically testified that they did not give the appellant and neither of the persons who actually entered the house, permission or authority to do so. The evidence further shows that for some time that night prior to the actual burglary, several other boys, besides appellant and his two companions who went around back and forth and away with him in his buggy, were back and forth over the town, to a church, some of them going in, others not, but upon the whole the evidence sufficiently shows that appellant's immediate companions during all this time were the two persons who were shown to have gone with him in his buggy to the back of the burglarized store and remained therein until they committed the burglary and the theft, and brought the goods back and placed them in his buggy, and immediately upon their doing so the three in the buggy drove off together and stayed together until after the distribution of the gloves as shown above. This is also shown to have occurred on a bright moonlight night, and we take it the jury was justified in concluding that he saw and knew all that was done and being done, and was a party thereto at the time of the burglary and theft and distribution of the stolen goods. The evidence was further sufficient to justify the jury to believe and find that the gloves that were distributed, and the pair that appellant himself received and got, were identified by the Fawcetts as the goods that were stolen out of their house the night of the burglary.

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The record shows that said accomplice, Tal Watkins, was the first witness introduced by the State. Of course, appellant was present and heard his testimony. He had the right to cross-examine him if he so desired. It seems he did cross-examine another witness, and that he himself introduced still another in his own behalf after the State had rested. Nowhere in the record is it shown or attempted to be shown by either the affidavit of the appellant, or of said witness Watkins, that he would have testified as claimed by appellant in his motion for new trial, and he in no way accounts for his failure to have him so testify, if he would, otherwise than the unsworn statement in the motion, that he was not represented by counsel and did not know how to bring out his defense.

In our opinion no reversible error is shown, and the judgment will be affirmed.

Affirmed.

George Brooks v. State.

No. 2072. Decided November 27, 1912.

1.—Theft from Person—Sufficiency of the Evidence.

Where, upon trial of theft from the person, the evidence was sufficient to sustain the conviction, there was no error.

2.—Same—Charge of Court—Recent Possession—Explanation.

Where, upon trial of theft from the person, the court's charge on recent possession and explanation fully submitted defendant's side of the case according to the facts in the case, there was no error.

Appeal from the District Court of Anderson. Tried below before the Hon. B. H. Gardner.

Appeal from a conviction of theft from the person; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

J. E. Rose, for appellant.—On question of insufficiency of the evidence: Roberts v. State, 1 S. W. Rep., 452; Graves v. State, 8 S. W. Rep., 471; Johnson v. State, 52 Texas Crim. Rep., 510, 107 S. W. Rep., 845; Brooks v. State, 56 Texas Crim. Rep., 513, 120 S. W. Rep., 878.

On question of court's charge on explanation: Roberts v. State, 24 S. W. Rep., 895.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, Presiding Judge.—Appellant was convicted of theft from the person, his punishment being assessed at three years confinement in the penitentiary.

The main contention is that the evidence does not sustain the conviction. Briefly stated, the statement of facts discloses that the

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alleged injured party Robinson had gone from his home in Houston County, fifteen miles distant, to the town of Palestine, and there became intoxicated. During the evening or rather at night while in this intoxicated condition he was in a saloon. There were negroes in there, and among them a negro who worked on Robinson's place, and who had accompanied him to Palestine. There was also another negro in there named Brooks, the appellant in this case. Robinson, following the usual custom of intoxicated men, was generously treating those who drink, among them appellant and one or more other negroes. Appellant bought a bottle of whisky and had offered to treat Robinson, in as much as the bar-keeper had refused to let appellant drink because he had reached the limit, whereupon appellant offered, perhaps at the request of Robinson, to open his bottle of whisky and give Robinson a drink of it. Appellant declined to do so in the saloon proper because it would interfere with the business of the saloon and invited Robinson into a rear room to take a drink. Robinson accompanied him. The bottle was opened, Robinson took a drink and let it drop on the floor, breaking it. Appellant insisted that Robinson should buy him another bottle, which Robinson agreed to do. He went to the bar and Robinson ordered the bar-keeper to let appellant have a bottle of whisky. There arose a discussion about the price of it, appellant claiming he had paid $1.25 for the broken bottle, and Robinson did not think he had paid but one dollar. While discussing the matter the negro friend of Robinson, whom he brought with him from his farm, reminded Robinson of the fact that it was about train time, and asked him to give him the money so he might purchase tickets. Robinson put his hand in his pocket to get the money and did get it, and gave it to his negro friend to purchase tickets. He then missed his watch, and stated that somebody had gotten his watch, and tried to ascertain what had become of it. His testimony indicates that the watch was taken before he and appellant returned from the rear room into the bar. After missing the watch he turned to Will Fisher, his negro friend he brought with him from the farm, and asked him if he had his watch, and he said, "No sir, I haven't got it," and he then turned to the crowd and said, "Have any of you all got my watch," and all of them said no. Appellant was in that crowd. This was immediately after returning into the bar from the rear room where he had taken a drink. Robinson went away to hunt an officer, and finally informed the officers that his watch had been taken. Appellant followed along after Robinson and when he reached the officers shortly after Robinson did, one of the officers asked him if he knew anything about the watch, and he replied that he did not. The officer then asked appellant if he got the watch, and he said no. He then asked him if he knew who did get it, and he said he did not, but he knew Robinson had the watch in the saloon, and about that time another negro came up and motioned to the officer, and he went to where he was, and he told the officer that he

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believed George (appellant) got the watch; that he had gone back in the rear end of the saloon with Mr. Robinson. The officer then walked back and began questioning appellant and about that time Mr. Reagan walked up, but Robinson had then gone back to the saloon. The officers began searching the parties, and among others they searched appellant and found the watch on his person. Officer Dublin testified in this connection that "Mr. Reagan searched him on one side and I searched him on the other, and I run my hand in his pocket and pulled the watch out, and I asked him whose was it, and he said, 'That is it; I was just fixing to take it back to him;' and so I took him and locked him up and gave the watch to Mr. Robinson." The account given by appellant at the time as to his possession of the watch and why he took it, is thus reported in the statement of facts: "Yes sir, after I taken it out of his pocket he said that he was keeping it to make the fellow pay him for a quart of whisky." Appellant's theory of the matter, after stating that he and Robinson had been back in the saloon and had taken a drink out of his bottle of whisky, and broke it, and the trouble arising afterwards as to the value of the bottle of whisky, was, speaking of Robinson: "He asked me what kind was it, and I told him that it was Cascade and that it cost $1.25, and he said, 'Aw, away with Cascade,' just that way, and I said, 'You won't pay for it?' and he said, 'Aw, that is all right,' and I said, 'What time have you got?' and he pulled his watch out and said, 'It is a little after eight' or something like that, and I said, 'All right, let me see' and he handed me the watch and I said 'I will keep this until you replace my whisky; when you replace my whisky I will replace your watch' and he said, 'Give me that watch' and I said, 'No, I will replace your watch when you replace my whisky,' and he said, 'That watch cost $25,' and I said, 'That isn't anything if it cost $125; my whisky cost $1.25, and if you will replace it I will replace your watch, and if not, I will know the reason why,' and that was all he said to me right there," He then narrates a conversation that occurred between himself and Will Fisher, the other negro mentioned as being Robinson's hired man. Appellant's theory was introduced by his own testimony and his statement to the officers at the time they took the watch from him, and the two accounts are substantially the same.

We are of opinion, so far as the facts are concerned, that the jury was authorized to take the view of it they did and find appellant guilty of theft from the person. Robinson says that appellant got the watch without his knowledge or consent; he was drinking, and indicates appellant got the watch in the rear room while they were taking a drink of whisky. Appellant's theory of it was, he got it as he stated by inducing Robinson to hand it to him, and then holding it in order to make Robinson replace the broken bottle of whisky. If Robinson and the officers are correct in their statements, then appellant took the watch from Robinson privately and surreptitiously

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without his knowledge, and when the officers asked him about it, denied having it several times, although immediately afterwards it was found upon his person. He then said he took it in order to force Robinson to pay for the broken bottle of whisky. Now, these two theories were submitted to the jury by the court in his charge. The jury was authorized to find the evidence for the State correct and truthful.

There is another contention to the effect that the court failed to charge appellant's theroy of the case as made by his explanation. The court thus charged the jury in this respect: "If defendant took the watch from the hand of said Robinson with the knowledge of said Robinson, or if defendant took it merely for the purpose of holding till he was paid for the quart of whisky that had been broken, or if you have a reasonable doubt on either of these issues you will return a verdict of not guilty." We are of opinion this does submit appellant's side of the case fully and in accord with his testimony and his explanation both. We have commended heretofore this manner of charging a jury with reference to explanation of stolen property instead of giving the lengthier charge with reference to reasonable doubt and the consideration of that and all other phases, etc. The charge given by the trial judge herein is simple, straight, unequivocal, and intelligible. We do not believe any jury could possibly misunderstand this charge, and if they believed the testimony and the theory of appellant, that he got the watch from Robinson as indicated in his testimony and in his explanation, they would have acquitted under this charge. They were plainly told that if he got the watch from Robinson with his knowledge or if he took it merely for the purpose of holding it until he was paid for the quart of whisky that had been broken, he would not be guilty under the charge of stealing from the person of Robinson, and that the jury should acquit him.

Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

T. B. CLEMENTS V. STATE.

No. 2152. Decided February 19, 1913.

1.—Murder—Misconduct of Jury—Former Trial.

Where, upon trial of murder and a conviction of manslaughter, the jury not only discussed the former conviction of defendant, but went so far as to discuss the term of years assessed against him, all of which evidently resulted in his conviction, there was reversible error; the result of the former trial not being in evidence, and of course, inadmissible.

2.—Same—Conduct of District Attorney.

The district attorney should not ask injurious and hurtful questions if he in fact knows there exists no foundation therefor, and unless he believes he can establish his point by legitimate evidence.

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3.—Same—Newly Discovered Evidence—Practice on Appeal.

Where the cause is reversed and remanded on other grounds, the question of newly discovered evidence need not be considered.

4.—Same—Evidence—Res Gestae.

Upon trial of murder, there was no error in admitting testimony as to what was found in the pockets of the deceased; it not being so remote as to render it inadmissible.

5.—Same—Verdict—Judgment.

Where the court only submitted manslaughter of which defendant was convicted, the verdict was sufficiently definite to base a judgment thereon.

Appeal from the District Court of McLennan. Tried below before the Hon. Richard I. Munroe.

Appeal from a conviction of manslaughter; penalty, two years imprisonment in the penitentiary.

The opinion states the case. For facts, see 61 Texas Crim. Rep., 161.

J. W. Taylor and *J. N. Gallagher,* for appellant.—On question of conduct of district attorney: in propounding questions to witnesses: People v. Cahoon, 50 N. W. Rep., 384; State v. Irwin, 60 L. R. A., 716; State v. Prendible, 65 S. W. Rep., 559; People v. Grider, 110 Pac., 586; Downing v. State, 61 Tex. Crim. Rep., 519, 136 S. W. Rep., 471; Leahy v. State, 48 N. W. Rep., 390; People v. Dane, 26 N. W. Rep., 781; People v. Montague, 39 N. W. Rep., 585.

On question of verdict: Moody v. State, 52 Tex. Crim. Rep., 232, 105 S. W. Rep., 1127; Branch Crim. Law, sec. 842.

On question of prior conviction raising no presumption of guilt: Pickett v. State, 51 S. W. Rep., 374; Moore v. State, 21 Texas Crim. App., 666.

On question of conviction in same cause and assessment of specific penalty not admissible: Wyatt v. State, 58 Tex. Crim. Rep., 115, 124 S. W. Rep., 929; Clark v. State, 23 Texas Crim. App., 260.

On question of statement by juror that defendant had been twice convicted stating punishment inadmissible: Hughes v. State, 70 S W. Rep., 746; Lankster v. State, 65 S. W. Rep., 373; Woolley v. State, 50 Tex. Crim. Rep., 214, 96 S. W. Rep., 27; Wyatt v. State, 58 Tex. Crim. Rep., 115, 124 S. W. Rep., 929; Ogden v. U. S., 112 Fed., 523; Hughes v. State, 67 S. W. Rep., 104; Tutt v. State, 49 Tex. Crim. Rep., 202, 91 S. W. Rep., 584; Rigsby v. State, 142 S. W. Rep., 901; Brown v. State, 57 Tex. Crim. Rep., 269, 122 S. W. Rep., 565.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was convicted of manslaughter, and prosecutes an appeal to this court.

It apears by the affidavit of the foreman of the jury that while the jury was considering their verdict, the jury not only discussed the

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former conviction of defendant of this offense, but one of the jurymen even went so far as to inform the others as to the term of years assessed against the defendant. That up to this time a portion of the jury had been in favor of an acquittal, but after being informed as to the result of the former trials, one who had been voting for acquittal stated that if that was the result of the former trials he would agree to a conviction if they would only assess his punishment at two years in the penitentiary.

On the trial of the case, it was in evidence that there had been former trials of this case, but the result of the former trials was not in evidence. Suppose on the trial the State had been permitted to prove that defendant on the former trials had been convicted and had been given a number of years in the penitentiary, over the objection of defendant. Would this not have presented reversible error, and if so, was the fact that it was not admitted in evidence on the trial, but the members of the jury informed of it after their retirement, and this argument used to get one to agree to a verdict, render it less hurtful? If such testimony was not admissible in evidence, the fact the jury was so informed, and discussed the matter after retirement, would necessarily do more harm to appellant, than if admitted on the trial, for if defendant knew that such evidence was before the jury he might seek to have it eliminated by moving to strike it out, or asking the court to instruct the jury not to consider it. But in this character of case inadmissible evidence is used to secure a conviction, or at least one member of the jury to agree to a conviction, and this will necessarily result in its reversal.

In another bill it is claimed that the State asked certain questions to prejudice the jury against witnesses for defendant, the State's Attorney knowing at the time that no grounds existed upon which to base such questions. If in fact the State's Attorney knew he could not establish a conspiracy between the appellant and the witnesses to whom the questions were propounded, then it was improper to ask such questions. But if the attorney had any reason to believe that he could establish that the witnesses were aware of appellant's intention to kill deceased (if he had such intention before the homicide) and expected to prove that the witnesses aided and abetted appellant, such questions were not only proper but it was his duty to seek to establish the conspiracy. On another trial the prosecuting officer can govern himself in accordance with this opinion, and he should not ask injurious and hurtful questions if he in fact knows there exists no foundation for such questions, but if he in fact thinks he can establish a conspiracy by legitimate testimony, then the questions were proper.

The discovery of new testimony need not be discussed, as it will not be newly discovered on another trial.

The testimony of the wife of deceased that she found a corkscrew and other articles named, in the pockets of deceased, was properly

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admitted in evidence. It was not at so remote a time as to render it inadmissible. The time that elapsed might go to its weight but not its admissibility.

The court only submitting the issue of manslaughter, the verdict was sufficiently definite upon which to base a judgment, but on account of the error above pointed out the judgment is reversed and the cause is remanded.

Reversed and Remanded.

SAM RAGLAND V. STATE.

No. 2146. Decided February 19, 1913.

Burglary—Continuance—Counsel—Postponement.

Where, upon trial of burglary, it appeared from the record on appeal that the defendant exercised no diligence in procuring the absent testimony or in employing counsel, and said testimony was probably not true, there was no error in overruling the motion for continuance and postponement.

Appeal from the District Court of El Paso. Tried below before the Hon. Jas. R. Harper.

Appeal from a conviction of burglary; penalty, two and one-half years imprisonment in the penitentiary.

The opinion states the case.

Owen & Boykin, for appellant.—On question on overruling defendant's application for postponement and continuance: Daughtery v. State, 26 S. W. Rep., 60; Kuehn v. State, 85 S. W. Rep., 793; Thomason v. State, 2 Texas Crim. App., 550; West v. State, 2 id, 209; Love v. State, 3id, 501.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was prosecuted and convicted of the offense of burglary and his punishment assesed at two and one-half years confinement in the penitentiary.

Appellant has three bills of exception in the record, all of which relate to the same proposition, and that is that apellant was placed on trial when he had no attorney, and when he desired the attendance of two witnesses whose names he did not know. No process had been issued for the witnesses, and no diligence used.

It appears from the record that R. V. Bowden's place of business was burglarized on the 13th of May, and two suit cases filled with clothing stolen; also a typewriter. Appellant was arrested next day in possession of one of the suit cases, while trying to sell some of the clothing. The other suit case was found in his room, as was also the typewriter, the typewriter being in his trunk covered up, and the clothing had been taken out of the suit case and placed in the trunk.

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When first arrested he claimed that he had purchased the suit case from a large, heavy set man about twenty minutes before his arrest. The proof shows positively that the articles were stolen on the night of the 13th, and that he was seen in possession of them within an hour after they were stolen.

When the case was called for trial he requested the court to postpone, stating that he had not employed counsel, but would do so in a day or two; that he had purchased the stolen articles from a man named Ash; that two men were present when he purchased them, and he did not know their names.

The sole question presented is, did the court err in refusing to give him further time in which to employ counsel, and err in refusing to give him further time in which to learn the names of the witnesses he says saw him purchase the stolen articles, and have them summoned. Whether he had attorneys on the trial of the case is not made manifest, but that he had attorneys file a motion for new trial is manifest.

Appellant was first arrested charged with this offense on May 14th, and had a preliminary trial, and was bound over to await the action of the grand jury. He then knew he would need an attorney, and would need these witnesses, if any one saw him buy these articles. The grand jury indicted him on May 22nd, and he was arrested on the indictment on that day. The case was called for trial on June 4th, and then it was this application for a postponement was made. We do not think the bills show any sufficient diligence on the part of appellant to learn the names of the witnesses or prepare the case for trial. The evidence strongly presents the theory that he himself was the thief, and the description he gave of the man from whom he purchased the property is wholly at variance with the apearance of Ash from whom, on the trial, he says he purchased the property. The record further discloses that Ash at the time of the burglary and at the time of the trial was a fugitive from justice, and clearly authorized the court to find that his testimony in regard to the purchase of the property on the night of the burglary was not probably true, and if he should secure the attendance of the absent witnesses, whose names he did not know at the time of the trial, they would not so testify.

We think the case discloses a total lack of diligence on the part of appellant, and the evidence conclusively shows his guilt.

The judgment is affirmed.

Affirmed.

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G. M. NESBITT v. STATE.

No. 2154. Decided February 26, 1913.

Rehearing denied March 26, 1913.

1.—Theft—Fraudulent Conversion—Continuance—Want of Diligence.

Where the witness had moved out of the county of the prosecution and no additional process had been issued, the diligence was insufficient.

2.—Same—Evidence—Want of Consent.

The fact that defendant offered to let prosecutor have an insurance policy on what he owed him would not tend to show whether or not he had authority to use the alleged check at the time he appropriated the same.

3.—Same—Evidence—Precedent.

Where the evidence objected to had been ruled to be admissible in the former appeal, there was no error.

4.—Same—Evidence—Bill of Exceptions—Cross-Examination.

Where defendant claimed in his direct examination that he had frequently rendered assistance to the prosecutor, there was no error in cross-examination to ask him whether he had ever signed any note for the prosecutor, which he answered in the negative; besides, the bill of exceptions was defective.

5.—Same—Evidence—Letters.

Upon trial of fraudulent conversion of a certain check, there was no error in admitting in evidence a letter which rendered intelligible defendant's letter and the reply thereto, nor was there any error in admitting defendant's letter to prosecutor.

6.—Same—Evidence—Bill of Exceptions.

Where the bill of exceptions showed that defendant's objection to a certain question was sustained, there is no room for complaint.

7.—Same—Evidence—Bill of Exceptions.

Where the bill of exceptions failed to set out the questions propounded or the answers given thereto or what testimony was admitted, there was nothing to review on appeal.

8.—Same—Charge of Court—Sufficiency of the Evidence—Argument of Counsel.

Where, upon trial of theft by fraudulent conversion of a check, the evidence sustained the conviction under a proper charge of the court, and the argument of State's counsel was not of such character to authorize a reversal, there was no error.

Appeal from the District Court of Coryell. Tried below before the Hon, J. H. Arnold.

Appeal from a conviction of theft of property over the value of $50; penalty, two years imprisonment in the penitentiary.

The indictment contained several counts alleging embezzlement, fraudulent conversion and theft.

The opinion states the case.

S. T. Sadler, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

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HARPER, JUDGE.—Appellant was prosecuted and convicted of theft of property of over $50 in value, and his punishment assessed at two years confinement in the penitentiary.

This is the second appeal in this case, the opinion on the former appeal being reported in 65 Tex. Crim. Rep., 349, and the facts are there sufficiently stated not to need repetition here.

An application for continuance was made on account of the absence of Davis Trout. The qualification of the bill shows that since the witness was summoned he had moved from Coryell County to McLennan County, and no additional process had been issued for this witness in that county. Appellant in his application states no reason why he had not had additional process issued, and under these circumstances the diligence is insufficient.

In the next bill appellant complains the court would not permit him to prove that some time after appellant had cashed the check and appropriated the money, H. L. Smith, the prosecuting witness, was in appellant's office, and appellant was trying to sell him a life insurance policy, and that Smith replied he did not have the money, when appellant offered to let him have the policy on what he owed him. This would not show nor tend to show whether or not he had authority to use the check at the time he appropriated it, and the court did not err.

Appellant again complains of the admissibility of the testimony of Leake Ayres. On the former appeal we held this testimony admissible, and we see no reason to revise that ruling, especially in the light of the qualification of the court to the bill. Stephens v. State, 49 Texas Crim. Rep., 489.

In the fourth bill it is shown that while appellant was testifying on cross-examination, he was asked: "Have you ever signed any notes for Herman Smith," to which the witness answered, "No sir," The connection or want of connection of this question with the other testimony of this witness is not shown in the bill, and, therefore, it is incomplete, but the court in approving same states that appellant while testifying on direct examination had stated he had frequently rendered assistance to Herman Smith, and on cross-examination he was being asked as to what assistance he had rendered, and this question among others were propounded. As thus explained there was no error in the ruling of the court.

There was no error in admitting the letter of Miller & Morgan to appellant in evidence, as it was rendered necessary to render intelligible the letter of appellant in reply thereto. The only objection made was to the sentence which referred to the notes which Smith had signed for appellant. As appellant, while cross-examining Smith, had elicited the fact that Smith had signed these notes, this matter presents no error. Neither was there any error in the court admitting the letter of appellant to Smith dated March 24, 1909. In this letter he says: "You know what I have done has been as intentionally

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honest as anyone could considering that I spent lots of money on the campaign, and on account of my ill health. I have meant no wrong, or desire to beat you out of a cent. I intend to pay you the sixty dollars which I owe you as well as take up the notes at the bank as soon as I can." The court in approving this bill states: "The subject of Smith's signing other notes for Nesbitt and their renewal," etc., was gone into by defendant in the cross examination of Smith. Nesbitt's version of the matter, other than as to the $60 check on which this prosecution is based, while clearly self-serving, was not permitted to be contradicted nor disproven by the State. As thus explained there was no error in the ruling of the court.

In bill No. 7, a question is set out as asked by the district attorney, but no answer is given, and the court in approving the bill states the objection was sustained, and no answer permitted. As the court sustained the objection, there is no room for complaint.

The bill which complains of the testimony of the witness Morgan does not set out the questions propounded, nor the answers given, nor give in substance nor in detail any portion of the testimony admitted. So it is not presented in a way we can review it.

The criticisms of the charge of the court present no error. It is a full and fair presentation of the issues involved in the case, and the evidence offered in behalf of the State supports the verdict. The remarks of the district attorney complained of should not have been used, if used. The bill as approved leaves it in some doubt as to whether this language was used, but conceding that it was used, no exception was reserved or special charge asked in regard thereto until some time after the jury retired, and it is not of that inflammatory nature for which we would feel authorized to reverse because of its use alone, especially so as appellant was given the lowest penalty authorized in law. All other questions were passed on in the opinion on the former appeal, and the judgment is affirmed.

Affirmed.

[Rehearing denied, March 26, 1913.—Reporter.]

BUD SIMPSON V. STATE.

No. 1976. Decided February 26, 1913.

Rehearing denied March 26, 1913.

1.—Murder—Statement of Facts—Filing—Signature of Judge.

Where the statement of facts was either dated back, or when filed did not bear the judge's signature, the same could not be considered on appeal.

2.—Same—Approval by Judge—Statement of Facts.

The law provides that the statement of facts must be signed and approved by the trial judge, and he is not required to approve a statement of facts, if he does not deem the same correct. Art. 824, Code Criminal Procedure.

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3.—Same—Evidence—Moral Turpitude.

Upon trial of murder, there was no error in admitting testimony that the defendant had served a term in the penitentiary; it not appearing that it was too remote.

4.—Same—Evidence—Bill of Exceptions.

Where the court refused to approve a part of the bill of exceptions and defendant accepts the same and does not resort to a bill by bystanders, the bill of exceptions, as presented in the record, will be considered on appeal. Following Blain v. State, 34 Texas Crim. Rep., 448.

5.—Same—Evidence—Res Gestae—Declarations by Deceased.

The acts, remarks and conduct of the deceased right after the shooting were admissible as res gestae.

6.—Same—Objections—Practice on Appeal.

Where the record showed that no exceptions to the testimony were reserved, there is nothing to review on appeal.

7.—Same—Charge of Court—Statement of Facts—Presumption.

In the absence of a statement of facts, if the charge of the court is applicable to any state of facts which can be proved under the indictment, the presumption is that the court charged the law and all the law applicable to the case. Following Wright v. State, 37 Texas Crim. Rep., 146, and other cases.

8.—Same—Charge of Court—Reasonable Doubt—Degrees of Offense.

If the court charges on reasonable doubt as to the whole case, this will be sufficient, in the absence of a requested charge as to reasonable doubt between the degrees of the offense.

Appeal from the Criminal District Court of Dallas. Tried below before the Hon. Robt. B. Seay.

Appeal from a conviction of murder in the second degree; penalty, thirty years imprisonment in the penitentiary.

The opinion states the case.

Ellis P. House, for appellant.—On question of cross-examination of defendant as to whether he had been in the penitentiary, etc: Choice v. State, 54 Tex. Crim. Rep., 517, 114 S. W. Rep., 132.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was prosecuted, charged with murder and found guilty of murder in the second degree, and his punishment assessed at thirty years confinement in the State penitentiary.

There is a statement of facts in this case filed with the clerk of the District Court on March 23, 1912. The judge's approval of the statement of facts bears date May 14, 1912, evidencing either one of two things; that the statement of facts was dated back, or the statement of facts when filed did not bear the judge's signature, and in either event we must treat the statement of facts as filed as if filed when the judge approved it, to-wit: May 14, 1912.

Not only is it true about these conflicts of dates, but appellant has filed an affidavit stating that the statement of facts has been changed by the judge, after it was filed by him, it thus appearing that the

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statement of facts was in fact filed with the clerk on March 23rd, without having been approved by the judge. Judge Seay has filed an affidavit stating that the statement of facts was not presented to him for approval, but learning on May 14th that the statement of facts had been filed with the clerk without his signature, he went through it, made such changes as he deemed proper to make a correct statement of facts, and then affixed his signature to it, desiring to give appellant a statement of facts in the case. Appellant objects to the statement of facts as thus approved by the court, and presents in connection with his affidavit a carbon copy of the statement of facts which he filed with the clerk, but the record shows the statement of facts filed with the clerk *had not been approved by the judge* at the time it was filed. Appellant seems to proceed upon the theory that if appellant's counsel and the county attorney agreed to a statement of facts, the trial judge has no discretion but must approve it as thus presented. This is not the law. The Code of Criminal Procedure provides that the same proceedings shall be had as to a statement of facts as is provided in civil cases, and the Civil Code provides in Articles 1379 and 1380 as follows: "If the parties or their attorneys agree on a statement of facts they shall sign the same and it shall then be submitted to the judge, who shall, if he finds it correct, approve and sign it, and the same shall be filed with the clerk. * * * If the parties do not agree upon such statement of facts, *or if the judge does not approve or sign same,* the parties may submit their respective statement of facts to the judge, who shall, *from his own knowledge* make out and sign and file with the clerk a correct statement of facts proven on the trial, and such statement shall constitute a part of the record." Thus it is seen in no event is the judge required to approve a statement of facts he does not deem correct, but in this case, it appears that he, finding a statement of facts on file without his signature, reads it, declines to approve it as filed, but makes such corrections as he deems proper, affixes his signature to it, in order to keep appellant from being deprived of a statement of facts, and if the matter had been left in the position that this would have presented the record, we might be authorized to consider it. But by the affidavits filed, it is shown that none of the provisions of the statute, in relation to a statement of facts, have been complied with, and under such circumstances we cannot consider the paper sent up with the record, nor the one attached to appellant's affidavit. (See Arts. 1379 and 1380, Revised Civil Statutes, and Art. 824 of the Code of Criminal procedure.)

In bill of exceptions No. 1 it is shown that appellant objected to it being proven that apellant had served a term in the penitentiary. This testimony was admissible, as it does not appear to have been too remote. The bill further recites that he objected to witness being permitted to testify that his wife got a divorce from him because he had been sent to the penitentiary. The court in approving the

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bill states no such testimony was admitted. When the court refused to approve this part of the bill, if appellant objected to him doing so, he should have excepted to the action of the court in so doing at that time, or got up a bystanders bill. Having done neither, we must accept the bill as presented in the record. (Blain v. State, 34 Texas Crim. Rep., 448.)

Bill No. 2 as modified by the court presents no error. The acts, remarks and conduct of the deceased right after the shooting were admissible as res gestae.

All the other exceptions to the testimony in the record are marked, "Refused—no such objection or exception taken." Under such circumstances we are not authorized to find that the exception was reserved, consequently we cannot review these matters.

In the motion for new trial there are many criticisms of the charge of the court, but it has always been the rule in this court, in the absence of a statement of facts, if the charge is applicable to any state of facts provable under the indictment, we will presume that the court presented the law, and all the law applicable to the case. (Wright v. State, 37 Texas Crim. Rep., 146; Jones v. State, 34 Texas Crim. Rep., 642; Bell v. State, 33 Texas Crim. Rep., 163.)

Appellant points out in the motion for new trial that the court failed to charge on reasonable doubt as between degrees of the offense. It is always better that the charge be given, but the general rule is that if the court charges on reasonable doubt as to the whole case, this will be sufficient when no charge is asked as to reasonable doubt between the degrees. In this case, having no statement of facts before us, and appellant being found guilty of murder in the second degree, this omission, in the absence of a request that the jury be so charged, does not present reversible error.

The judgment is affirmed.

Affirmed.

[Rehearing denied March 26, 1913.—Reporter.]

W. M. STEPHENS V. STATE.

No. 2310. Decided February 26, 1913.

Rehearing denied March 26, 1913.

1.—Burglary—Indictment—Description—Private Residence.

An indictment for burglary need not allege what property was stolen or the value thereof; nor is it necessary to allege the character of the house, unless it is intended to charge specifically that it was a private residence.

2.—Same—Indictment—Daytime or Night-time Burglary.

Where the indictment for burglary alleged that the offense was committed by force, threats and fraud, the same covered either a daytime or a night-time burglary. Following Carr v. State, 19 Texas Crim. App., 635, and other cases.

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3.—Same—Charge of Court—Other Transactions.

Where, upon trial for burglary, the evidence showed that a barn was forcibly entered and a saddle, bridle and blanket taken therefrom, and at the same time a horse was taken out of the lot, which latter was found in defendant's possession, there was no error in refusing a requested charge to disregard all testimony as to defendant's possession of said horse.

4.—Same—Charge of Court—Daytime Burglary.

Where the indictment was sufficient to charge a burglary either at night or in the daytime, and the evidence showed that it was committed after 4:30 in the morning and before daylight, there was no error in refusing a requested charge to acquit defendant, unless the evidence showed a daytime burglary.

5.—Same—Charge of Court—Limiting Testimony.

Where, upon trial of burglary, the evidence showed that a saddle, bridle and blanket were forcibly taken from a certain barn and also a certain gray mare from the lot in which said barn stood, and defendant was found in possession of said mare shortly thereafter, a charge of the court limiting said possession of said mare to the fact as to whether defendant was the party who entered the barn was proper, and not on the weight of the evidence.

6.—Same—Evidence—Signature of Judge.

Where the bill of exceptions to certain testimony as to whether the party rode a horse or a mule, etc., was not signed by the trial judge, the same could not be considered on appeal.

7—Same—Evidence—Other Transactions.

Where, upon trial of burglary, the evidence showed that at the time of the taking of the alleged stolen property from the burglarized barn, a certain horse was taken, which was found in defendant's possession shortly thereafter, the same was an incriminating circumstance which was admissible in evidence.

8.—Same—Continuance—Want of Diligence.

Where defendant's application, besides showing a want of diligence, did not show the materiality of the testimony, the same was correctly overruled.

9.—Same—Sufficiency of the Evidence.

Where, upon trial of burglary, the evidence was sufficient to sustain a conviction, there was no error.

Appeal from the District Court of Travis. Tried below before the Hon. Geo. C. Calhoun.

Appeal from a conviction of burglary; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Thelbert Martin, for appellant.—One question of overruling continuance: Yautir v. State, 49 Tex. Crim. Rep., 400, 94 S. W. Rep., 1919.

On question of insufficiency of the evidence: Jones v. State, 25 Texas Crim. App., 226; Morgan v. State, 25 id, 498.

C. E. Lane, Assistant Attorney-General, for the State.—On question of sufficiency of the indictment: Conoly v. State, 2 Texas Crim. App., 412; Martin v. State, 21 id, 1.; Buchanan v. State, 24 id, 195.

DAVIDSON, PRESIDING JUDGE.—The indictment charges that appellant did by force, threats and fraud, break and enter a house there

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situate, and owned, occupied and controlled by J. E. Barker, without the consent of the said J. E. Barker, etc.

There are several grounds urged against the sufficiency of the indictment, all of which are without merit. The indictment is in the usual form and sufficiently charges burglary. One of the grounds is that it does not allege whether the burglary was committed in the daytime or night; nor does it allege what property was stolen, nor the value of the property; that it does not allege the character of the house, whether a private residence, or otherwise. There is no merit in any of those contentions. The indictment does not have to allege what property was stolen, nor the value of it; nor is it necessary to allege the character of the house, unless it is intended to charge specifically that it was a private residence. This was not a private residence, nor is there any merit in the proposition that the indictment failed to allege whether the offense was committed in the day-time or night-time. It does allege that the house was, by force, threats and fraud, broken and entered. This was sufficient to cover a daytime or night-time burglary. This question came specifically before the court in Carr v. State, 19 Texas Crim. App., 635; see also Montgomery v. State, 55 Texas Crim. Rep., 502; True v. State, 48 Texas Crim. Rep., 631; Walker v. State, 55 Texas Crim. Rep., 546.

Appellant requested the court to charge the jury as follows: "Gentlemen of the jury, you are instructed to disregard all testimony as to the possession by this defendant of a certain horse alleged to have been stolen from the prosecutor herein, J. E. Barker," which the court refused to give. The court was correct in not giving this charge. The State's case was in substance that someone broke and entered the barn, or harness house, and took from it a saddle, bridle and blanket. This occurred somewhere after 4:30 o'clock in the morning. The horse in question was taken at the same time and evidently by the same party. The horse was taken from the lot,—not from the house. Appellant was seen with this animal twelve to eighteen days afterwards in San Angelo, some three hundred miles from where the horse was stolen. The theory of the State was that whoever broke the house to get the bridle, saddle and blanket, did so for the purpose of riding the animal which was stolen at the same time and place. The possession by defendant of the horse was a strong circumstance to connect him with the burglary. If he took the horse from the lot, he was evidently the party who committed the burglary. The court in charging the jury limited the effect of this testimony.

A charge asked by appellant was to the effect that they should disregard all testimony showing or tending to show that the offense herein charged was committed at any other time than in the daytime and should confine their consideration of the testimony and evidence to a daytime burglary, and if they should find that the testimony does not show a daytime burglary, or if they should believe that the evidence showed a burglary committed at any other time,

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then that should acquit defendant. This charge was properly refused. The indictment was sufficient to charge the burglary was committed at night or in the daytime. It was evidently committed, however, after 4:30 in the morning, and before daylight.

The court charged the jury that evidence having been introduced as to the alleged taking of the gray mare from the possession of the alleged owner at the time of the burglary from the harness house, and from the witness Barker, they must believe, beyond a reasonable doubt, that defendant took said mare, and if they believed from the evidence, beyond a reasonable doubt, that the defendant took said mare, at the time of the alleged burglary, then they could consider the said testimony only for the purpose for which it was allowed to be introduced, that is, for the purpose of assisting the jury (if it shall assist them from the facts and circumstances attending the said taking of said mare, if any taking there was), taken in connection with the other evidence in the case, to determine whether or not the defendant committed the specific charge alleged in the indictment; that the fact that the defendant may have committed an offense other than the specific offense charged in the indictment in this case (if such is a fact) can not be considered by the jury for any purpose, unless the facts and circumstances in connection with such other offense (if any) shall assist the jury in determining whether or not the defendant committed the specific offense charged in the indictment in this case; and the jury can not under any circumstances convict the defendant of any other than the specific offense charged in the indictment in this case. The objection urged was that this charge was upon the weight of the evidence, and calculated to mislead the jury in that it calls attention to the taking of a horse and does not leave it clear that the indictment herein is for burglary, entry in a harness house for the purpose of taking a saddle and not a horse. We are of opinion that the charge is not subject to the above criticism. It was a sufficient limitation of the evidence in regard to the animal as to its office and mission, and bearing upon whether defendant was the party who entered the house. His possession of the horse could be used only as a circumstance to connect him with the burglary. The authorities, so far as we are aware, all sustain the charge of the court. Contemporaneous crimes are admissible for the purpose for which this testimony was admitted, and it was proper and correct for the court to so charge, and might have been reversible error if the court had not limited the testimony in regard to the animal.

Another bill of exceptions recites that appellant objected to the testimony of two witnesses, Roach and Harris, to the effect that they had each seen a man passing their residence, riding a horse or mule sometime after the alleged burglary and it was after sundown, and it was not possible to tell whether said horse or mule had a saddle on or not; and that they could not tell whether said man was black or

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white. It is unnecessary to review this bill of exceptions, because it is not signed by the Judge.

Another bill recites that the State introduced testimony to the effect that defendant had been arrested in San Angelo, Texas; that at the time he was arrested he had in his possession a certain gray mare; that this mare had been taken from the lot of J. E. Barker in Travis County on the morning of the 12th of March, 1912. This was objected to because it was immaterial, irrelevant and had no bearing upon the case. The court was requested to exclude it upon the same grounds. This was overruled by the court and correctly. The possession of stolen property a few days subsequent to its theft, would be evidence of an incriminating nature had he been on trial for the theft of the animal, but his possession of the animal was used as an incriminating circumstance in this case to connect him with the burglary, because the mare was taken at the same time and place of the burglary. The court ruled correctly.

Another bill of exceptions insists that the court erred in overruling his application for continuance. We do not agree with this contention. The application is deficient in many respects. It does not set out the diligence used to obtain the absent witnesses, but that might not be of a serious nature as this is the first application. Aside from the diligence, or want of diligence, the application shows that appellant wanted the attendance of Sam Phipps, Sam Boyd, and Lee Gardener. He says that the residence of Phipps and Boyd is unknown to the defendant, but that they were in Waco, McLennan County, at the time he saw and knew them; and Lee Gardener represented his residence as Big Springs or Midland, Texas. When he saw these parties as with reference to this case is not shown. He says he expects to prove by Gardener that he, defendant, bought a horse from him, Gardener, and at the time he had no horse nor saddle in his possession. When this occurred, he does not allege or make any showing as to the connection it had with this case, or what effect this evidence, if he had it before the jury, could possibly have had upon this case. He says by Phipps and Boyd he expects to prove that he was in Waco, McLennan County at the time the said offense with which he is here charged, was committed. This is too general, to say the least. This is the substance of appellant's application, so far as these witnesses are concerned, and the facts he expected to prove by them.

The most serious question in the case is the sufficiency of the evidence. Without going over it, we are of opinion that the jury were justified in believing that appellant is the party who broke and entered the house to get the saddle, bridle and blanket with which to ride the gray animal mentioned by the witnesses in this case. Appellant's possession of it a few days after the theft and his various statements in connection with it, are, we think, sufficient to

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justify the jury in reaching the conclusion that he was the guilty party.

The judgment is affirmed.

Affirmed.

[Rehearing denied March 26, 1913.—Reporter.]

P. A. STEWART V. STATE.

No. 2238. Decided January 29, 1913.

Rehearing denied February 26, 1913.

1.—Local Option—Jury and Jury Law—Oath.

In the absence of a bill of exceptions, the complaint that the jury were not sworn cannot be considered on appeal.

2.—Same—Charge of Court—General Objections.

General objections to the charge of the court without pointing out the error complained of cannot be considered on appeal, although a number of errors thereon are assigned in the brief. Following Ryan v. State, 64 Texas Crim. Rep., 628, and other cases.

3.—Same—Charge of Court—Invited Error—Burden.

Where the charge requested and refused was substantially given in the court's main charge, any error arising therefrom cannot be questioned by the party requesting the charge. Following Cornwell v. State, 61 Texas Crim. Rep., 122, and other cases; besides, the charge was not on the burden of proof.

4.—Same—Motion for New Trial—Practice on Appeal.

Where appellant, in his brief, complained that the court did not present defendant's defense affirmatively, but no such objection was placed in the motion for new trial, the same could not be considered on appeal, and there was no error under Article 723, Code Criminal Procedure. Following Joseph v. State, 59 Texas Crim. Rep., 82, and other cases.

5.—Same—Field Notes—County Map—Election.

Where, upon trial of a violation of the local option law, the defendant complained that the field notes describing the commissioner's precinct in which the local option law was violated did not close, and that, therefore, the local option election was void; yet, where the calls were such in the field notes that anyone on the ground from known marks on the ground could clearly trace the line, there was no such discrepancy as would vitiate the creation of the precinct, and the election was valid. Following Williams v. State, 52 Texas Crim. Rep., 371.

6.—Same—Requested Charges—Practice on Appeal.

Without entering into a discussion whether the grounds assigned pointed out specific error in refusing requested charges; yet, looking at the evidence in the record, no issues were raised by the evidence which authorized the submission of the charges requested; and this but illustrated the rule that the motion for a new trial should point out the errors in refusing special charges.

Appeal from the District Court of Potter. Tried below before the Hon. James N. Browning.

Appeal from a conviction of a violation of the local option law; penalty, one year imprisonment in the penitentiary.

The opinion states the case.

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Counsel for appellant took the ground that the failure of the court to give a requested charge is sufficient to bring said refused charge under review without pointing out specifically the error why it should have been given, as the charge itself specifically and pertinently presents the matter of defense raised in the evidence, reviewing Ryan v. State, 64 Texas Crim. Rep., 628, and cases cited in opinion.

Reeder & Dooley and *W. F. Ramsey,* for appellant.—On question of the court's charge: Moore v. State, 59 Tex. Crim. Rep., 361, 128 S. W. Rep., 1115.

On question that defendant was entitled to a distinct and affirmative charge on his defensive theories: Freeman v. State, 52 Tex. Crim. Rep., 500, 107 S. W. Rep., 1127.

On question of field notes: Ex Parte Waits, 64 S. W. Rep., 254.

HARPER, JUDGE.—Appellant was prosecuted for selling intoxicating liquor in violation of the prohibition or local option law; convicted, and his punishment assessed at one year confinement in the State penitentiary.

R. L. McMurtry, who is sheriff of Briscoe County, testified that he was in Amarillo and stopped at the Oriental hotel. That he saw appellant and bought a pint of whisky from him, paying him a dollar for it, and identified on this trial the bottle of whisky that he purchased from appellant. That it was whisky is shown beyond question, appellant admitting that it was whisky, but denied he sold it to the sheriff, saying he had given it to him. Appellant testified that McMurtry stopped at his hotel and said he was sick, and wanted a bottle of whisky. That he let him have the whisky, getting it out of a wardrobe in a room of the hotel. He further states that as he handed McMurtry the whisky, McMurtry offered him a dollar, when, to quote his own language: " 'said, 'No, that is all right, that is all right.' He said, 'No, you don't need to be afraid of me.' I said, 'I would not sell a man a bottle of whisky for a thousand dollars.' He took that dollar and throwed it on the bed. I said, 'No, no.' He said, 'Don't be afraid of me.' I said, 'Go on and put it in your pocket' and I turned around to close that door and I doubled a piece of paper to put it over the top of that and when I turned around the money was not on the bed." He later testified that he asked McMurtry to take back the dollar or give him back the whisky, and states that after getting out of jail he found the money on the bed where he claimed McMurtry had thrown it. A deputy sheriff testifies that he searched the room while appellant was in jail, taking off the cover, searching for whisky, and no dollar was on the bed, and McMurtry testified he did not throw the money on the bed but gave it to appellant direct. Appellant's testimony would make it a gift of whisky, while that offered by the State would make it a sale.

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The first ground in appellant's motion for new trial complaining that a portion of the jury was not sworn cannot be considered, as such fact, if fact it be, is not verified by any bill of exception, nor in any other way.

The second ground reads as follows: "The court erred in the fourth paragraph of his charge to the jury, wherein he connected the defendant's defense with the State's theory of the case, in this, that, the court instructs the jury in said paragraph four (4), that if they found and believe from the evidence that the defendant, Stewart, furnished and delivered State's witness, McMurtry, intoxicating liquor, but that at the time he so furnished and delivered to said McMurtry such liquor, 'he did not sell the same to said McMurtry, but gave it to him, the defendant would not be guilty,' etc." In the *brief* a number of errors are assigned as to this paragraph of the charge, but under the decisions of this court we cannot consider them. We have copied in full the ground in the motion for new trial, and it will be seen that no error in the charge is pointed out, and it is too late to do so in the brief filed in this court, if error there be. In the case of Mansfield v. State, 62 Tex. Crim. Rep., 631, 138 S. W. Rep., 591, this court held: "Appellant contends, in a general way, that the court erred in not charging the law of manslaughter. The exception in the record presenting this matter is found in the motion for new trial in the following language: 'The court should have charged on manslaughter.' This is found at the close of the second paragraph of the motion for new trial, and then in the third ground of the motion it is stated the court should have given a correct charge to the jury, as raised by the testimony of defendant, concerning the alleged insulting note which was carried to defendant's wife by deceased Thomas, knowledge of which was conveyed to defendant on the evening before the homicide, and which, if believed by the jury, would reduce the homicide to manslaughter. The extract from the ground of the motion is not sufficient to present the failure of the court to charge on manslaughter. It is too general. See Joseph v. State, 59 Tex. Crim. Rep., 82, 127 S. W. Rep., 171."

In Sue v. State, 52 Texas Crim. Rep., 122, this court held: "Various and sundry assignments of error were made by appellant in his motion for new trial to the charge of the court as follows: (Then is copied the paragraph of the court's charge complained of.) Again it is alleged: 'That he erred in all that part of his charge which attempts to define manslaughter as will more fully appear by the court's charge on pages 6 and 7 and in bill of exceptions No. 37, which is as follows: (Then follows a paragraph of the charge.) These complaints of the charge cannot, under the rules of this court, be considered because the complaint is too general. How, or wherein the charge is wrong is not pointed out. To copy a charge and say that the court erred in giving that charge, is not sufficient under the rules of this court."

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In Cornwell v. State, 61 Tex. Crim. Rep., 122, 134 S. W. Rep., this court held: "The charge of the court on the issue of provoking the difficulty is complained of in this language: 'The trial court committed error in the twenty-first paragraph of the main charge wherein he attempts to apply the law of provoking a difficulty. The same is not the law, is not clear, and had the effect and was calculated to mislead the jury.' We think these complaints are so general in their character as not to require a review by this court of the matter attempted to be presented. The motion does not point out in what respect the charge was not the law, wherein it was not clear, or how and in what manner it was calculated to mislead the jury. The particular paragraph set out in the brief of counsel for appellant has been condemned by this court, but we are not sure that, taking the charge of the court altogether, even if the motion, with sufficient directness, challenged the charge, it would be ground for a new trial. But it seems clear under the authorities that the complaint is so general as not to be sufficient to require a review at our hands. Pollard v. State, 58 Tex. Crim. Rep., 299, 125 S. W. Rep., 390; Phillips v. State, 59 Tex. Crim. Rep., 534, 128 S. W. Rep., 1100; Roma v. State, 55 Tex. Crim. Rep., 344, 116 S. W. Rep., 598; Holmes v. State, 55 Tex. Crim. Rep., 331, 116 S. W. Rep., 571; Duncan v. State, 55 Tex. Crim. Rep., 168, 115 S. W. Rep., 837."

Many other decisions of the court could be cited, but we have so recently reviewed this question and the reason for the rule, and cited the authorities in Byrd v. State, 151 S. W. Rep., 1068; Ryan v. State, 64 Texas Crim. Rep., 628, 142 S. W. Rep., 878, and Berg v. State, 64 Texas Crim. Rep., 612, 142 S. W. Rep., 884, we do not deem it necessary to do so again.

This paragraph of the court's charge is not copied in the motion in its entirety, but in the brief it is claimed that it shifts the burden of proof upon the defendant. The paragraph is in substance the same as charge No. 2 requested by defendant, and if complained of in a way we could consider it, the error, if error there be in this respect, it was invited by defendant, and under such circumstances he cannot explain. In Cornwell v. State, 61 Tex. Crim. Rep., 122, 134 S. W. Rep., 221, this court held: "Where the charge requested and refused has been substantially given in the court's charge, any error arising therefrom cannot be questioned by the party requesting the charge." In this decision will be found collated a large number of authorities so holding.

However, when we read the paragraph as a whole we do not think it shifts the burden of proof, for in the part not copied in the motion for new trial the court tells the jury "and if you have a reasonable doubt as to whether defendant gave said McMurtry the intoxicating liquor set out in the indictment, you will acquit the defendant."

Grounds three and four in the motion for new trial read: "The court erred in refusing to give in charge to the jury special charge

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No. one (1) as requested by the defendant herein," and fourth, "The court erred in failing and refusing to give in charge to the jury special charge No. 2 as requested by the defendant." These complaints in the motion are too general. (See authorities above cited.) However, as hereinbefore stated, special charge No. 2 was in substance given in the court's charge, and there is no evidence upon which to base charge No. 1. So if presented in a way we could consider them, there would be no error. However, upon these two general grounds in the motion, there is sought to be assigned in the brief an assignment that the court did not present defendant's defense affirmatively. If the appellant desired to assign any such ground, it should have been placed in the motion for new trial, and there being no such ground in the motion, it cannot be assigned in this court. In Joseph v. State, 59 Tex. Crim. Rep., 82, 127 S. W. Rep., 171, this court held: "In the absence of a bill of exceptions, or a ground in the motion for new trial urging such defects in a charge, this court is not authorized to reverse a case." This has always been the rule in this court since the adoption of Article 723 in its present form, and necessarily so because the Legislature has the right to place such limitations on this court in the matter of an appeal as it deems proper. In the brief there are other assignments not contained in the motion for new trial, but as we are not authorized to consider them under the law, we deem it useless to recite them.

There is, however, one other ground in the motion for new trial being based on the allegation that the field notes describing commissioners precinct No. 1 are deficient, in that the calls do not close, and, therefore, the election is void. A map of Potter County accompanies the record with the commissioners precincts marked thereon, as well as the field notes of the precinct. That portion of the field notes of which complaint is made reads as follows:

"Commissioners Precinct No. one: Beginning at the North corner of Survey No. 107, Block 46 Houston & Texas Central Railroad Co. land; Thence South & West with South bank of Canadian river to the North East corner of Survey No. 32, Block No. 5, G. & M.: Thence South with East line of Survey 32-35, Blk. G. & M. 5, to the the North line of Survey 1 Blk. 4 A. C. H. & B. Thence West with North line of said Survey No. 1 to the N. W. corner of said Survey No. 1," etc. There is no contention that the remainder of the field notes do not close and properly describe the territory, but to make the contention of appellant plain we copy the following map in the record: (See copy of map on next page.)

It is thus seen that where the field notes call "thence South with East line of Survey 32-35, Blk. G. & M. 5, to the North line of Survey 1, Blk. 4 A C. H. & B., 55," etc., no mention is made of the 93 vara off-set which is shown on the map at S. E. corner of survey 32 and N. E. corner of survey 35, and it is the omission of this call that appellant contends renders the creation of commissioners pre-

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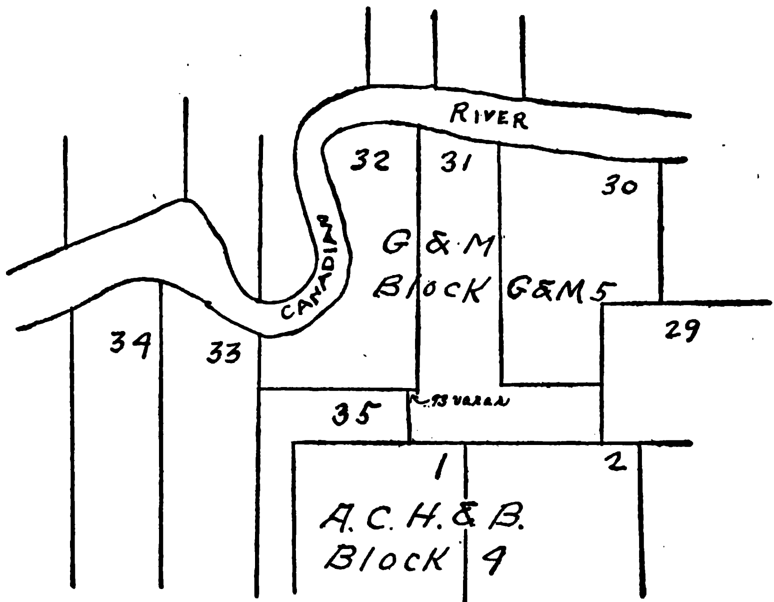

Exhibit "B."

cinct No. 1 void, and the orders, etc., for the election on prohibition following these calls, renders the local option election also void. The map would show that the adjoining commissioners precinct also follows these calls. So that if the line of survey 32 should be extended on South without reference to the off-set to the north line of survey one, the territory would be in one of the commissioners precincts as created, and under any construction given these calls no territory would be omitted from a commissioners precinct. However, calling as these field notes do for the east lines of the two surveys, we think the slight off-set would not render the creation of the precinct void, but as the calls were such that any man on the grounds, from the known marks on the ground, could clearly trace the lines, no such discrepancy occurs as would vitiate the creation of the precinct. In the case of Williams v. State, 52 Texas Crim. Rep., 371, in which it was claimed there were some slight discrepancies in the calls of the boundaries, the court held that as the calls were sufficiently definite to mark and make manifest to all parties the territory within the limits, it would hold the calls sufficient, since any intelligent man could readily ascertain the true limits from an inspection. That the courts of this State have always upheld boundaries where a slight discrepancy occurred. No man could be deceived by the slight discrepancy here shown, and we hold that the order creating the precinct is a valid order, and the election properly ordered.

The judgment is affirmed.

Affirmed.

ON REHEARING.

February 26, 1913.

HARPER, JUDGE.—Appellant in this case has filed a motion for a new trial and an able brief in which he says:

"Now at this time comes P. A. Stewart, appellant in the above entitled cause, and moves the court to grant him a rehearing herein and set aside and for naught hold the judgment and opinion of this court, entered and rendered herein on January 29, 1913, affirming the judgment of the court below, and moves and prays the court to reverse and remand the case, as in law, in his judgment, it should do, and as grounds of such motion says:

"1. The court erred in refusing to sustain the third ground of his motion for new trial in the court below, to this effect:

" 'The court erred in failing and refusing to give in charge to the jury special charge No. 1, as requested by the defendant herein.'

"2. The court erred in failing and refusing to sustain the fourth ground of his motion for new trial to the following effect:

" 'The court erred in failing and refusing to give in charge to the jury special charge No. 2, as requested by the defendant herein,' For the reason that the charges therein referred to are the law of the case, nowhere given in the court's general charge, and refer and

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relate to a phase of the case raised by the testimony, and which are required by law to be submitted to the jury.

"It is the purpose and object of this motion to ask the court to carefully reconsider so much of its opinion as, in substance, holds that the motion for new trial filed in the court below was not sufficiently specific as to bring in review the action of the court in refusing to give in charge to the jury the special instructions above referred to. For the purposes of this argument, we shall assume that the opinion of the court, holding that the complaint of the fourth paragraph of the court's charge was too general, is correct, and that its judgment and conclusion that, if there was error therein the same was invited, is also correct, nor shall we, in this argument, make any question with the court as to the accuracy and correctness of its opinion holding that the slight inaccuracy of description of the precinct in which the election was held did not have the effect to avoid such election."

It is thus seen that the appellant bases this whole motion on the ground that the court erred in not considering those grounds which complained of the failure to give the two special charges requested. Without entering into a discussion of whether or not those grounds are too general, and failed to point out specifically the error, we will consider whether or not the court erred in failing to give the special charges requested. The first special charge reads: "You are instructed that if you believe that defendant intended to give McMurtry the bottle of whisky in question and handed said whisky to McMurtry with that intention and that McMurtry slipped a dollar under a quilt on the bed, without the knowledge and consent or connivance of the defandant, then you will find the defendant not guilty and will by your verdict acquit the defendant."

As said in the original opinion, there was no testimony on which to base this charge. McMurtry's testimony is copied in the original opinion and he says: "I bought a pint of whisky from him there on the day of the 13th in the afternoon. That was on the 13th of February. I paid him a dollar for it. I bought this whisky in a little room southeast of the office or desk right down the aisle there. I saw where he got the whisky from; it was out of a wardrobe on the south side of the room, and I was standing right by him. I received the whisky right there without moving out of my tracks. I paid him right there in the room. He handed the whisky directly to me. I handed him the money right in the same transaction where I got the whisky."

Appellant testified when McMurtry came in the room, 'I handed him the whisky; he took it in his left hand and handed me a dollar. I said, 'No, that is all right; that is all right.' He said: 'No, you don't need to be afraid of me.' I said, 'I would not sell a man a bottle of whisky for a thousand dollars.' He took that dollar and throwed it on the bed."

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These are the only two eyewitnesses to the transaction. So it is seen there is no testimony, "that McMurtry slipped a dollar under a quilt without the knowledge of defendant, and it has always been the rule that it is not error to refuse to charge on an issue not made by the testimony.

The next special charge reads: "You are instructed, gentlemen of the jury, that if the defendant P. A. Stewart, intended to give the bottle of whisky to witness McMurtry and with such intention handed the bottle of whisky to witness McMurtry, and McMurtry after receiving the whisky offered to pay defendant for same and defendant refused to accept pay therefor and then defendant requested said witness McMurtry to keep his money or return the whisky to him, and if witness McMurtry refused to return the whisky but threw a dollar on the bed and took the whisky away against defendant's will, the defendant would not be guilty and if you find that the transaction was as detailed above or if you have a reasonable doubt as to whether the transaction was as detailed above, you will acquit the defendant."

The court, in his main charge, instructed the jury: "If you find and believe from the evidence that the defendant P. A. Stewart, did, on or about the 13th day of February, 1912, in commissioner's precinct number one in Potter County, Texas, furnish and deliver to said R. L. McMurtry intoxicating liquor, but that at the time he so furnished and delivered to said McMurtry such liquor, if any, he did not sell the same to McMurtry, but gave it to him, then in that case defendant would not be guilty of the offense charged in the indictment and defined in this charge; and if you have a reasonable doubt as to whether the defendant P. A. Stewart gave said R. L. McMurtry the intoxicating liquor set out in the indictment, on or about the 13th day of February, 1912, in Commissioner's Precinct No. one in Potter County, state of Texas, then and in that case you will acquit the defendant and say by your verdict, 'Not guilty.'

"In all criminal cases the burden of proof is on the State." So it is seen that the issues presented in the special charge were as favorably presented in the court's charge than in the charge requested. The sole issue was, did appellant sell or give McMurtry the whisky. They both testified that McMurtry got the whisky,—the only question was, did McMurtry pay him for it? The charge as a whole, presents the case as favorably, or more favorably to defendant, in the light of the evidence, than the special charge requested.

This case but illustrates why the motion for new trial should state in what way the error was committed in refusing special charges. If appellant had been required to point out wherein the error consisted in refusing special charge No. 1, no such assignment would have been in the motion, and we would not have been compelled to read and re-read the evidence to see if by any construction such a charge was required or even authorized. As to the second special

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charge, the court having charged on gift, which issue the evidence raised, if the motion had pointed out wherein appellant thought his special charge No. 2, more aptly and fully presented that issue under the evidence than the charge as given by the court, it would have aided this court and the trial court in passing on that ground. But one who reads special charge No. 2, and the charge of this court as given, copied herein, will see that no jury could have been misled by the difference in wording of the two.

Motion for rehearing is overruled.

Overruled.

CARLOS CHAFINO V. STATE.

No. 2147. Decided February 26, 1913.

1.—Assault to Rob—Sufficiency of the Evidence—Alibi.

Where, upon trial of assault with intent to rob, the evidence was sufficient to support the conviction, although defendant's alibi was strongly supported by evidence for the defense, there was no error.

2.—Same—Evidence—Custom.

Where, upon trial of assault with intent to rob, the prosecuting witness stated that the reason the defendant did not get his money was that the witness had it in his shoe, there was no error in permitting him to testify that this was his custom.

3.—Same—Argument of Counsel—Bill of Exceptions.

Where the bill of exceptions did not point out the error in the argument of State's counsel, and no written charge was requested, there was no error. Following Clayton v. State, 67 Texas Rep., 311.

Appeal from the District Court of El Paso. Tried below before the Hon. James R. Harper.

Appeal from a conviction of an assault with intent to rob; penalty, five years imprisonment in the penitentiary.

The opinion states the case.

W. H. Fryer, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—The appellant appeals from a conviction of an assault with intent to rob, with a penalty of five years in the penitentiary.

The evidence for the State was amply and clearly sufficient to sustain the conviction. Appellant's defense was alibi, which was correctly submitted by the court and found against him. While appellant denied the assault to rob and had evidence by his mother, brother and himself sufficient to have established an alibi, if believed by the jury, the testimony of the State positively and without question, if believed, identified the appellant as one of the parties who committed

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the assault with intent to rob, and the circumstances detailed, if believed by the jury, clearly established the State's case.

Appellant has a very brief and incomplete bill of exceptions, showing that he objected to the prosecuting witness testifying that he had his money in his shoe on the night of the alleged assault, and that it was his custom to carry his money in such manner. The bill shows no error in the admission of this testimony. This witness testified that the assault was committed by two persons,—one having a pistol and stopped him, and made him hold up his hands, while the other went through all his pockets and ran his hands up and down his body and legs in search of money, and his explanation of why they did not get his money was that he had it in his shoe and was accustomed to carry it there.

Appellant has another bill in which he claims he objected to this statement by the prosecuting attorney in his closing argument to the jury: "Gentlemen, this defendant's record is against him." The bill is entirely too meager and does not show error. No written charge is shown in the record requesting the court to charge the jury not to consider this remark, even if it was objectionable. Clayton v. State, 67 Texas Crim. Rep., 311, 149 S. W. Rep., 119.

Nothing else is presented requiring any further discussion.

The judgment is affirmed.

Affirmed.

Charley Caples v. State.

No. 2160. Decided February 26, 1913.

1.—Aggravated Assault—Continuance—Impeaching Testimony.

Where the application for continuance did not show proper diligence, and the absent testimony was of an impeaching character, there was no error in overruling same. Following Butts v. State, 35 Texas Crim. Rep., 364.

2.—Same—Evidence—Drunkenness.

In the absence of testimony that the prosecuting witness was drunk, there was no error in excluding testimony that when he was drunk that he did not know anything until he became sober.

3.—Same—Evidence—Physical Examination.

Upon trial of aggravated assault where the evidence showed that the prosecuting witness was severely whipped with switches, there was no error in introducing testimony of a physical examination of said witness, within two or three days after said assault, to show the condition of his body.

4.—Same—Evidence—Imputing Crime to Another.

Where the witness could not recall who the persons were that talked about whipping the prosecuting witness some months before the alleged offense, there was no error in excluding his testimony.

5.—Same—Evidence—Moonlight—Almanac.

Where the testimony did not show that there was moonlight at the time of the alleged assault, and the hour was not definitely fixed, the exclusion of an almanac as testimony to show that the moon was down at a certain time of night was not material.

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6.—Same—Evidence—Impeaching Witness.

Where the defense had laid a predicate to impeach the testimony of the prosecuting witness, there was no error in anticipating such attack upon the witness and permitting the State to show that said witness had made similar statements to others with reference to certain things.

7.—Same—Charge of Court—Alibi.

Where, upon trial of aggravated assault, the evidence did not raise the issue of alibi, there was no error in the court's failure to charge thereon.

8.—Same—Charge of Court—Simple Assault.

In the absence of evidence raising the issue of simple assault, there was no error in the court's failure to charge thereon.

9.—Same—Charge of Court—Principals.

Where, upon trial of aggravated assault, the evidence raised the issue of principals, the court correctly charged thereon.

10.—Same—Aggravated Assault—Means Used—Disgrace.

The statute is broad enough to embrace any instrument with which a whipping may be administered, if done under circumstances which would inflict disgrace.

Appeal from the County Court of Sabine. Tried below before the Hon. T. R. Smith.

Appeal from a conviction of aggravated assault; penalty, a fine of $100.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.—On question of corroborating State's witness: Hamilton v. State, 36 Texas Crim. Rep., 372; Kirk v. State, 35 id., 224; Reddick v. State, 35 id., 463; Campbell v. State, 35 id., 160; Duke v. State, 35 id., 283; English v. State, 34 id., 190; Gibson v. State, 23 Texas Crim. App., 414.

HARPER, JUDGE.—This is a companion case to that of Curtis Craig and others now pending before this court in which they are all charged with making an aggravated assault on Joe Horton.

Horton testified: "I lived on July 30, 1911, on the Thornhill place three or four miles southeast from the home of John McGown, at that time. John McGown, who was a very old man, is my brother-in-law. He married my sister. I went to John McGown's house about dark on the 30th of July, 1911, to carry some buttermilk for him to drink. He was sick at that time and had been for two or three weeks, and I had been sitting up with him about every other night. When I reached the house that night John Travis and Jim Bailey were sitting on the gallery. Dr. Mann McGown, a son of John McGown, was in the house. Bud Smith came in a little later and stayed a while and left. Tom Jack was also there for a while. Henderson McGown was also there that night. There were two or three women also there. I sat down by the bed and was fanning old man McGown just after dark when Joe Click, John Russell, Charlie

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Caples, Hardy Thornton and Curtis Craig came. Bud Smith came in and asked how Mr. McGown was and said he would go home. He left and I heard him singing on his way home. About 8:30 Hardy Thornton came to the door and invited me out and I went out with him into the yard. He got over the yard fence (there was no gate) and I followed him over the fence. Just as I got over the fence Charley Caples, and John Russell and Joe Click jumped up from behind the fence and grabbed me. Some one asked me if I had any money. Caples and Thornton held me by the arms and Click held me by the neck and choked me. They carried me about two hundred yards down the road and searched me. The only thing I had was a pocket knife and they took that. They then took a drink and Click asked me if I wanted a drink and I told him no, and Click said to me, 'You God damned son of a bitch, we've got something else besides whisky for you.' They threatened to hang me and said they would shoot me if I even grunted. They then took me immediately about a quarter of a mile, and took me up to a tree near the road and held my arms around the tree while they beat me with switches. Click was the first one to strike me. They all took turns at whipping me, and kept it up until I promised not to tell about it. They must have whipped me an hour and a half or two hours. They took my pants down and raised my shirt and whipped me on my naked skin. Curtis Craig was the one that took my pants down. Russell and Caples were the ones that held me up to the tree. There were five of them. Curtis Craig, Hardy Thornton, John Russell, Joe Click and Charlie Caples. They talked about killing me. Caples said let's kill him. 'Dead cocks don't crow.' While they were whipping me John Russell struck a match and looked at his watch and said it was 11 o'clock. I think myself it was about that time. They kept me for about a half or three quarters of an hour longer and turned me loose. I went in direction of my home. I was pretty badly beaten up in the small of my back and on my thighs. I was laid up the next day. They used a beech limb and ironwood switches. The last lick I received was by Curtis Craig, who struck me with a dogwood limb or pole about three and one-half inches in diameter. It was a dead pole and broke when he struck me with it. The place where I was whipped was about one-quarter of a mile from John McGown's house. They whipped me in the woods near the road. The timber was not so very thick. It was about the same distance to the next nearest house. I did not see or hear any one on my way home. I went back to the place of the whipping on Tuesday morning after the whipping on Sunday night and found some switches there. (Identifies switches.) I carried them to John McGown's and showed them to Jeff McGown and George McGown, and I then brought them to Hemphill and showed them to Deputy Sheriff R. H. Minton and the Justice, Mr. Barker. I brought them here on Wednesday after I was whipped. I was whipped in Sabine County, Texas."

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Appellant testified that he and others went to Mr. McGown's to wait on the sick, and that Joe Click carried a bottle of whisky along to give to the sick, but was informed that McGown did not need it, and then testified: "Joe Click then said, well, we might as well drink it up." We walked out in the yard, crossed the fence in front of the house and walked down the road some thirty or forty yards and sat down. Joe Horton, John Russell, Hardy Thornton, and Curtis Craig were along. When we sat down Joe Click passed the bottle around and we all took a drink. We sat there and talked a little bit and all took another drink. When the whisky, about half a quart of it, was gone, Joe Horton remarked that he had been sitting up and was about played out and believed he would turn in. He started off towards home in the direction of Alex Dickersons. This was the same road taken by Bud Smith when he started home. I have been living at Bronson for about ten years, and have known Joe Horton for about that length of time. I have never had any trouble with or hard feelings toward Joe Horton. Never had anything against him. I did not assault or assist in doing so. None of the other defendants molested him in any way there that night. When he left us sitting by the road side that night about forty yards from McGown's house, we sat there for a while and talked, then went to the house. Some of the boys went home shortly afterward but Click and I stayed until about 11 or 12 o'clock waiting on McGown. When we left we went straight home to Bronson and went to bed. I have no idea who it was that whipped Joe Horton that night, if he was whipped. He was not whipped by any of the people at McGown's so far as I know. I am sure he was not while I was there. The last I saw of him was when he started towards home about forty yards from the house. He said he was going home."

The first bill of exceptions complains that the court erred in overruling his application for a continuance on account of the absence of Steve Connor, whom he desired as a witness. In the first place, we do not think the application shows proper diligence, and in the second place, the testimony of the witness would only have a tendency to impeach the State's witness, Joe Horton, and it is the rule that a continuance will not be granted to secure impeaching testimony. (Butts v. State, 35 Texas Crim. Rep., 364.)

The appellant offered to prove by Frank Ellison that when the prosecuting witness was drunk he became crazy and did not know anything until he became sober. There is no testimony that the witness Horton was drunk on the night he received the whipping, consequently the court did not err in excluding the testimony.

The State proved by the witness Jeff McGown: "I examined the body of Joe Horton on Tuesday, August 1st, 1911. There were some bruises on his back and hips. The skin was broken on his left hip and thigh and back. There were some blue marks on him, too. I went with Joe Horton down back of the field near an old road and

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examined the place where Joe Horton said he was whipped. I saw tracks and some switches there. Witness identifies switches in court as the same he saw on the ground where Horton was alleged to have been whipped and where he saw the tree and tracks. Joe took the switches away with him. I saw where a bunch limb had been cut from a tree Joe Horton told me that the defendants had whipped him. He said that all five of them including this defendant, had whipped him at the place where he showed me the switches, and said the switches he showed me were the ones they used to whip him."

It was also proved by Mr. Barker: "I am justice of the peace of precinct No. 1, Sabine County, Texas. I saw Joe Horton and examined him about the 2nd of August, 1911. I found his hips and thighs badly bruised and the skin was broken. There were considerable whelps on his body. The bruises were blue and puffed up."

After this testimony had been admitted the defendant moved to exclude it on the ground "that defendant was not present at the time of the examination, and it was made at a time too remote from the alleged assault." The record shows that the prosecuting witness was whipped on the night of the 30th of July, and these examinations took place in two and three days thereafter, and the time was not too remote, and the testimony as to the condition of his body was properly admitted in evidence.

The appellant offered to prove "that during the spring or early summer of 1911 he heard some parties at LeMerl talk about whipping Joe Horton because he would not work and support his family," but the witness would have stated he could not recall who these persons were. The court did not err in excluding the testimony. To have rendered the testimony material and admissible he must have identified the persons in some way, and placed them in position where they could have made the assault.

There was no error in excluding the almanac as it would have proven no material fact and would not have tended to impeach the witness Horton. He had not testified that the moon was shining at the time he was whipped, but if he had, the testimony as to the hour he was whipped was not fixed so definitely as the almanac would have shown that the moon was down at this time. Horton testified that a match was struck and he saw the parties plainly.

The State also proved by Jeff McGown that at the time Horton went with him to the place where he was whipped and showed him the switches, etc., Horton told him who did the whipping, and named appellant as one of the persons. This was objected to on the ground that it was hearsay; that appellant was not present, and appellant had not sought to impeach Horton. It is true at the time this witness testified appellant had only laid predicates to impeach Horton, and perhaps the testimony was prematurely offered and admitted, but as appellant did, after having laid the predicates, follow this up by introducing the impeaching testimony, the testimony then be-

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came admissible, and the fact that it was prematurely offered would present no grounds for reversal.

The court did not err in refusing the charge presenting the issue of alibi. There was no evidence showing that at the time the whipping was alleged to have taken place, that appellant was at another and different place. He in his testimony admits that he was with Horton at the place where Horton says they took hold of him and carried him to the place where he was whipped, and Horton positively identifies him as one of the men who did the whipping. Appellant denied, it is true, whipping Horton, but this issue was sufficiently presented in the charge of the court.

By reading the testimony hereinbefore copied it will be seen the issue of simple assault was not raised by the testimony, and the court did not err in not submitting that grade of the offense to the jury.

Appellant complains that the court erred in applying the law as to who are principals in commission of an offense, not that there is any error in such charge, but that such charge is not called for by the evidence. The evidence of Joe Horton herein copied shows the court did not err in that respect.

The court instructed the jury that "an assault becomes aggravated when the instrument or means used is such as inflicts disgrace upon the person assaulted as an assault or battery with a whip or cow hide; that it is not necessary that the instrument used should be a whip or cow hide, but any instrument that would inflict disgrace, such as a stick and switches, would be an aggravated assault." Appellant complains of this paragraph of the charge on the ground "that the statute specifically names the instruments which would inflict disgrace, a whip or cow hide, and does not include a stick and switches." The statute reads: "When the instrument or means used is such as inflicts disgrace upon the person assaulted, as an assault or battery with a cow hide or whip." It is thus seen this clause is broad enough to embrace any instrument with which a whipping may be administered, if done under circumstances which would inflict disgrace.

The judgment is affirmed.

Affirmed.

CHARLES SEROP V. STATE.

No. 2274. Decided February 26, 1913.

1.—Robbery—Statement of Facts—Statutes Construed.

Where the statement of facts was signed by the county attorney and approved by the trial judge who stated that the statement of facts was correct, that he approved the same and ordered it filed as a part of the record in the cause, and the same was filed within time, the same was a substantial compliance with Article 824, Code Criminal Procedure, when taken in connection with the Revised Civil Statutes on this subject, although the same was not signed by appellant's counsel. Following Kelso v. Townsend, 13 Texas, 140.

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2.—Same—Bills of Exception.

Where the bills of exception were not presented and approved and filed within the time allowed by law, the same cannot be considered on appeal, and only objections to the charge complained of in the motion for new trial can be reviewed.

3.—Same—Charge of Court—Circumstantial Evidence.

Where, upon trial of robbery, the evidence was not entirely circumstantial, but positive in its character, there was no error in the court's failure to charge thereon.

4.—Same—Evidence—Conduct of Defendant—Charge of Court.

The acts and conduct of defendant when he was arrested were admissible in evidence, and there was no error in the court's failure to limit the same.

5.—Same—Charge of Court—Other Transactions.

Upon trial of robbery, there was no error in admitting testimony that another person was robbed at the same time and place as the one alleged in the indictment, and no charge in relation thereto was called for.

6.—Same—Charge of Court—Alibi—Imputing Crime to Another.

Where, upon trial of robbery, the defense was an alibi and imputing the crime to another, and the court's charge properly submitted these issues to the jury, there was no error.

7.—Same—Misconduct of Jury—Affidavit.

Where the ground of the motion for new trial alleged misconduct of the jury, but no supporting affidavits were attached, the same could not be considered on appeal.

8.—Same—Sufficiency of the Evidence.

Where, upon trial of robbery, the evidence supported the conviction, there was no error.

Appeal from the Criminal District Court of Dallas. Tried below before the Hon. Robt. B. Seay.

Appeal from a conviction of robbery; penalty, five years imprisonment in the penitentiary.

The opinion states the case.

Wilson & Williamson, for appellant.—On question of admitting evidence of other transactions: Burrell Criminal Evidence, sec. 171, pp. 657-658; Horan v. State, 7 Texas Crim. App., 183; Pettibone v. U. S., 148 U. S., 197; State v. Patton, 49 S. W. Rep., 389; Underhill Criminal Evidence, sec. 446.

C. E. Lane, Assistant Attorney-General, for the State.—On question of statement of facts: Leggett v. State, 56 Texas Crim. Rep., 125.

HARPER, JUDGE.—Appellant was convicted of robbery, and his punishment assessed at five years confinement in the penitentiary.

There is a motion made to strike out the statement of facts because not signed by appellant's counsel, although signed by the county attorney, and approved by the district judges. There are some decisions so holding, but is this a correct construction of the provisions

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of our statute? Article 824 of the Code of Criminal Procedure provides that if a case is appealed, a statement of facts may be drawn up and certified and placed in the record as in civil cases. Our Civil Code, Article 1379, provides that if the parties agree upon a statement of facts, they shall sign the same, and it then shall be submitted to the judge, who shall, if he finds it correct, approve and sign it, and the same shall be filed with the clerk; and the next succeeding article (1380 provides if the parties do not agree upon a statement of facts, or if the judge refuses to approve one that is agreed to, the parties may submit their respective statements to the judge, who shall from his own knowledge make out and sign and file with the clerk a correct statement of facts proven on the trial, and such statement shall constitute part of the record.) In the case of Kelso v. Townsend, 13 Texas, 140, Judge Lipscomb held: "Where there was a statement of facts which was signed by the attorney for appellant only, and the judge certifies that he 'signed the foregoing as a statement of all the material facts proved upon the trial of the cause,' etc., it is held that the presumption is that the attorneys failed to agree on a statement of facts, and the judge made out the statement of facts under the authority given him to do so." The opinion further states: "But it is said that the judge has not in this case made out his own statement of the facts, but has certified to the correctness of the statement of one of the parties. If he was satisfied that the statement presented to him by the only party who chose to comply with the law was correct, that it corresponded with his own recollection of the evidence, his adoption of that statement was certainly a compliance with the spirit of the statute, the main object of which was to secure a correct statement of the facts to become a part of the record." This rule was adhered to in Darcy v. Turner, 46 Texas, 30; McManus v. Wallis, 52 Texas, 534, and in the case of Harlan v. Haynie, 9 Texas, 460, it is said: "In this case the statement of facts sent up does not affirmatively show that a disagreement took place between the respective counsel, but as the judge's name is alone signed to it, the presumption is irresistible that they did." Other cases so holding by our Supreme Court could be cited, and as the Code of Criminal Procedure provides that rule prescribed in civil cases shall govern, why should this court give to these articles of the civil statutes a construction different to that given by our Supreme Court to those articles. We think the rule announced by Judge Lipscomb in the Kelso v. Townsend case, supra, is the correct construction to give to those articles of the civil procedure, and the cases holding otherwise are overruled. The object and purpose of the law is to have presented to this court a correct statement of the facts, which must be verified by the signature of the judge trying the case, and when the statement of facts is thus verified, in the absence of any question being raised as to its correctness, it should be considered by this court. This court, we frankly confess, has some decisions holding

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otherwise, and striking the statement of facts from the record, although verified by the judge's signature, and we may, in some instances, have followed them, but they have never appealed to us to be a correct construction of these two articles of the statute, and we will follow them no longer.

In this case the statement of facts is signed by the county attorney, and the same is approved by the judge trying the case, he stating "that the statement of facts is correct and he approves the same, and orders it filed as a part of the record in the cause." It is filed with the clerk in the time permitted by law, and we see no good reason why it should not be considered.

The bills of exception, however, we cannot consider. The law requires of one and makes it his duty to prepare and file within the time allowed his bills of exception. If he does not do so, it is through his neglect, and under such circumstances he has no one to blame but himself. The bills of exception not having been presented, approved and filed within the time allowed by law, the motion is sustained as to the bills of exception, and they are stricken from the record. (Blackwell v. State, 33 Texas Crim. Rep., 278.) But the bills to the admission and rejection of testimony present no material error if considered. Any exception taken to the charge of the court will be sufficiently presented if complained of in the motion for new trial.

The court did not err in failing to charge on circumstantial evidence, as the witnesses Baird and Fomby both swear positively as to the identity of defendant as the person who robbed Baird. The acts and conduct of one when he is arrested is always admissible in evidence, therefore, the court did not err in admitting this testimony, nor in failing to limit the effect of it in his charge. It was also permissible to show that Fomby was robbed at the same time and place as Baird, and no charge in relation thereto was called for. The evidence shows that Baird and Fomby were held up by two men whom they identify as appellant and Bruce Willis, one of them holding a pistol on Baird and Fomby while the other went through them and took their money, watch, etc. The defendant testified, denying any knowledge of the robbery, and testified that he was at another and different place. The court instructed the jury fully as to this defense, charging them:

"Among other defenses set up by the defendant is what is known as an alibi, that is, that if the offense was committed, as alleged, that the defendant was, at the time of the commission thereof, at another and different place from that at which such offense was committed, and therefore was not and could not have been the person who committed the same.

"Now, if the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the place where offense was committed at the time of the commission thereof, you will find him not guilty.

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"If you find and believe that some person or persons at or about the time and place stated in the indictment, did commit the crime of robbery of Joe Baird, but you further find and believe that the parties who did so were Bruce Willis and some other party, then you will find the defendant not guilty; and if you have a reasonable doubt as to whether this is true you will give the defendant the benefit of the doubt and acquit him. If you find that said robbery was committed but was committed by any other two persons than the defendont, the defendant not being present at the time, acting together as principal with the person who so committed said robbery, then you will find the defendant not guilty; and if you have a reasonable doubt as to whether this is true you will give the defendant the benefit of such reasonable doubt and acquit him."

In the motion for a new trial defendant alleges that the jury discussed on their retirement the prevalence and frequency of robbery in the city of Dallas, and alleges that this discussion was detrimental to defendant. This ground of the motion is not supported by the affidavit of any juror nor any person who purports to know that such matters were discussed by the jury, therefore, it presents no error.

The evidence offered in behalf of the State supports the verdict, and the judgment is affirmed.

Affirmed.

A. L. PETERS V. STATE.

No. 2214. Decided February 26, 1913.

1.—Attempted Burglary—Sufficiency of the Evidence.

Where, upon a trial of an attempt to commit burglary, the evidence showed that the steps taken by defendant had gone beyond a mere preparation, and the only step remaining would have been to have committed the completed offense, the conviction was sustained.

2.—Same—Name of Defendant.

Where defendant was indicted under the name of A. L. Pierce and on trial suggested his name was A. L. Peters, and the same was corrected in accordance with his suggestion, there was no error.

3.—Same—Name of Party Injured.

Where the name of the party injured was alleged to be A. Dodson, Jr., and the proof showed his name to be A. Dodson, there was no variance.

4.—Same—Charge of Court—Entry.

Where the court gave the proper charge on entry of the house, there was no error in refusing special charges which were not based on the evidence.

Appeal from the District Court of Wichita. Tried below before the Hon. P. A. Martin.

Appeal from a conviction of an attempt to commit burglary; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

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W. T. Carlton, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was prosecuted and convicted of the offense of attempting to commit the crime of burglary, and his punishment assessed at two years confinement in the penitentiary.

The facts show that Mrs. Dodson was awakened at night by some one walking in her home. She called her husband, who went upstairs and found appellant, who, when hailed, attempted to escape. Dodson had a pistol and drew it, when appellant threw up his hands. He was searched and three skeleton keys taken off of him. He was in his sock feet, having taken off his shoes and put them in his pocket. When first challenged he said he was hunting a drink of water, but the water was downstairs in a room Mrs. Dodson says appellant passed through. He then said he had been asleep in the bath room for four hours and was attempting to leave when he was detected. The proof shows that he was heard going upstairs just before Mrs. Dodson called her husband, and when he got upstairs he turned off the hall light and the light in the bath room.

On the trial he said he had received a letter from a woman, and went there at 2 o'clock at night to see her, giving her name. It was shown that no such woman was stopping at this house.

Our Code provides that if any person shall attempt to commit the crime of burglary he shall be punished by confinement in the penitentiary for not less than two nor more than four years, and an "attempt" is defined to be an endeavor to accomplish the crime of burglary carried beyond mere preparation, but falling short of the ultimate design.

In this case appellant being found upstairs with his shoes off, with skeleton keys in his possession, which witnesses testify will open any ordinary door, and with soap on his person of the kind that can be used to soap a key so it will make no noise in unlocking a door; that he fled when hailed, and his contradictory explanations of his presence there, we think authorized the jury to find he entered the house with the intent to commit the crime of burglary, and was only prevented from doing so by timely discovery. The steps taken had gone beyond a mere preparation, and the only step remaining would have been to have committed the completed offense. When appellant was arrested he gave the name of Morgan; a bank deposit book was found on him of a Fort Worth bank bearing the name of A. L. Pierce, and he was indicted as A. L. Pierce. On the trial he suggested his name was A. L. Peters, when the court, by a proper order, ordered the name corrected in accordance with his suggestion. In this there was no error.

He was alleged to have entered the house of A. Dodson, Jr. The proof shows that the house was occupied by A. Dodson, and Mr.

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Dodson testified he knew of no other A. Dodson. In Branch's Crim. Law, sec. 621, it is said that "Jr." or "Sr." form no part of a person's name, and may be rejected as surplusage. (Lassiter v. State, 35 Texas Crim. Rep., 540; Steinberger v. State, 35 Texas Crim. Rep., 492; Wesley v. State, 45 Texas Crim. Rep., 64.) In Windom v. State, 44 Texas Crim. Rep., 514, Presiding Judge Davidson discusses this question at length, and holds that insertion or omission of the word "Jr." creates no variance, citing many authorities.

There was no evidence on which to base the first special charge requested, and the second special charge is not the law of this case, but the charge given by the court on entry of the house was correct.

There are several complaints of the charge of the court, and we have carefully considered each of them, but the charge is a fair, full and correct presentation of the law applicable to this offense under the evidence adduced, and the judgment is affirmed.

Affirmed.

JOE COOPER V. STATE.

No. 2286. Decided February 26, 1913.

1.—Accomplice—Murder—Evidence—Other Offense.

Where defendant was indicted as an accomplice to the murder of A and the State was permitted to introduce evidence over defendant's objection that he had procured his principal to kill M, the same was reversible error, as there was no allegation in the indictment that defendant advised his principal to kill the latter.

2.—Same—Accomplice—Rule Stated—Conspiracy—Offense Defined.

To constitute an accomplice under our statute, it must be charged and proved, first, that an agreement had been entered into and the principal had been advised or commanded by the accomplice to commit the crime; second, that the principal committed the offense; third, that before the crime was committed, the accomplice advised or commanded the principal to do the particular overt act, or some act within the purview of the original design; fourth, that these acts were within the term of the conspiracy or agreement between the principal and accomplice.

3.—Same—Rule Stated—Indictment—Principal—Accomplice.

Inasmuch as our statute has created a difference between principals and accomplices, it necessarily follows that indictments must follow this distinction in charging the imputed dereliction, as an accomplice cannot be convicted under an indictment charging the party as a principal, or vice versa.

4.—Same—Theory of the State—Case Stated—Mistake.

Where the theory of the State's evidence was that the principal was employed by the accomplice to kill M and that the principal by mistake killed A, but this mistake was not charged in the indictment nor was the conspiracy to kill M charged in the indictment, the conviction could not be sustained.

5.—Same—Statutes Construed—Mistake of Fact—Independent Design.

See opinion construing Articles 48, 49, 50, 80, 82, Revised Penal Code, with reference to accomplices and principals, and the commission of other offenses by accident or mistake, holding that the independent design of the principal to kill deceased cannot constitute guilt of the alleged accomplice, and that a mistake or accident on the part of the principal must grow out of or be connected with the original design between the principal and the accomplice.

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Appeal from the District Court of Bowie. Tried below before the Hon. P. A. Turner.

Appeal from a conviction of murder in the second degree; penalty, ten years imprisonment in the penitentiary.

The opinion states the case.

R. H. Jones and *Mahaffey & Thomas,* for appellant.—On question of admitting evidence of another offense than the one alleged in the indictment: Arcia v. State, 28 Texas Crim. App., 198; Mitten v. State, 24 id., 346; Powell v. State, 12 id., 238; 11 Am. & Eng. Cyc., p. 533; Carbough v. State, 49 Texas Crim. Rep., 452, 93 S. W. Rep., 738.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was convicted as an accomplice to the murder of Hub Anderson.

Where a party is charged as an accomplice under the statute with the commission of a felony, the case assumes by virtue of such a charge the nature, to some extent at least, of a conspiracy. There must be an antecedent agreement between the principal and the accomplice to the effect that a crime be committed by the principal, and this crime must be the subject of such agreement between the parties. It is requisite that the principal shall agree to commit the designated or mentioned crime, and it is further requisite that he commit the crime in order to secure the conviction of the accomplice. There can be no accomplice until the principal has committed the offense. The mere advising or commanding to commit an offense does not render the accomplice guilty unless the agreement between the parties reaches the dignity of a conspiracy. In that case, of course, the conspiracy being an independent offense under our statute, all the parties to it would be guilty of the conspiracy. It is not sufficient that an agreement exists between the principal and the accomplice; it must further be alleged and proved that the crime was committed by the principal. We are not here discussing the question of conspiracy as an independent offense when the accusation pleaded in the indictment is conspiracy. The statute has made a distinction between a conspiracy as an offense and an offense committed by the principal, moved and instigated by an accomplice. A conspiracy is complete as an offense when a positive agreement has been made between the parties to commit a felony, but this is not the case as to principals and accomplices. Where the party is charged as being an accomplice, the principal must commit the crime, thereby becoming the real actor in the crime. Those not present or participating in the actual commission of the crime may and usually do become accomplices under the Texas statute. Though a conspiracy is a distinct crime, and punishable as such, yet it may be in a certain sense

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a part of the offense subsequently actually committed in pursuance of or in accordance with such conspiracy. In the crime of conspiracy it is sufficient to charge that offense and go no further, but if the conspiracy is consummated by executing the purposes of the conspiracy, then the actual perpetrator becomes a principal and the absent conspirators are to be punished as accomplices. These distinctions necessarily follow from the provisions of the Texas statutes. In some states the difference between accessories before the fact, or accomplices under our statute, and principals, has been abolished, but that is not the case in Texas. To constitute an accomplice under our statute, it must be charged and proved, first, that an agreement has been entered into, that is, the principal has been advised and commanded to commit the crime; second, that he committed the offense; (in that case he is a principal); third, that before the crime was committed the accomplice advised or commanded the principal to do the particular overt act, or some act within the purview of the original design; fourth, that these acts were within the terms of the conspiracy or agreement between the parties, principal and accomplice. Inasmuch as our statute has created a difference between principals and accomplices, it follows necessarily that indictments must follow this distinction in charging the imputed dereliction. An accomplice cannot be convicted under an indictment charging the party as a principal, nor can a principal be convicted under an indictment charging that he is an accomplice. The above propositions are so well settled that it is unnecessary to discuss them or cite authorities in support. It is as well the law that the indictment must charge the elements of the offense set forth in the legislative act creating that offense. It is not necessary to discuss this question as it is axiomatic, and unless the pleadings so aver they are insufficient and are demurrable.

Appellant was convicted under an indictment charging him to be an accomplice to Frank Rutherford whom he, appellant, had previously advised, commanded and encouraged to kill Hub Anderson. The indictment also charges the killing of Anderson by Rutherford and the absence of appellant at the time and from the place of the homicide. Upon the trial the State was permitted to introduce evidence, over appellant's objection, that appellant had procured Rutherford to kill Clarence McDonald. These objections were manifold, all concentrating in the general or central proposition that the allegations of the indictment did not authorize the admission of such evidence, and that such evidence would authorize appellant's conviction for an offense not charged in the indictment, and that he could not plead jeopardy, etc. It is unnecessary to state the grounds of objection in detail. They are full and ample. We are of the opinion the evidence was inadmissible. There was nothing in the indictment to indicate that appellant advised Rutherford to kill McDonald. The charge was that he advised Rutherford, the principal, to kill Ander-

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son. There was, therefore, nothing in the pleadings notifying or suggesting to appellant that he would be called upon to answer for an agreement or conspiracy to kill McDonald. He was notified by the averments in the indictment, and called upon to meet a charge that he had only advised Rutherford to kill Anderson. The facts show conclusively that appellant had not advised Rutherford to kill Anderson, but had advised him to kill McDonald, thereby disproving the charges contained in the indictment. The theory of the State's evidence sustained by the court, was that Rutherford was employed by appellant to kill McDonald, and that Rutherford by mistake killed Anderson, but this mistake was not charged in the indictment, nor was the conspiracy to kill McDonald charged in the indictment. If the State relied upon that character of evidence, the indictment should have so charged. The case charged and that sought to be shown by the State in support of the indictment are entirely different, and materially so, and in contravention of the statute.

Article 48 of the Revised Penal Code reads as follows: "If one intending to commit felony, and in the act of preparing for or executing the same, shall, through mistake or accident, do another act which, if voluntarily done, would be a felony, he shall receive the punishment affixed by law to the offense actually committed."

Article 80 of the Revised Penal Code reads as follows: "To render a person guilty as an accomplice, it is not necessary that the precise offense which he may have advised, or to the execution of which he may have given encouragement or promised assistance, should be committed; it is sufficient that the offense be of the same nature, though different in degree, as that which he so advised or encouraged."

Article 82 of the Revised Penal Code reads as follows: "If in the attempt to commit one offense the principal shall by mistake or accident commit some other under the circumstances set forth in articles 48, 49 and 50, the accomplice to the offense originally intended shall, if both offenses are felonies by law, receive the punishment affixed to the lower of the two offenses; but, if the offense designed be a misdemeanor, he shall receive the highest punishment affixed by law to the commission of such misdemeanor, whether the offense actually committed be a misdemeanor or a felony."

If under the terms of Article 48, supra, Rutherford intended to kill McDonald but through mistake killed Anderson, he would be guilty of murder in the second degree. This is so well settled it is not deemed necessary to discuss it. Those who desire to investigate the matter, however, will find the cases collated in Branch's Crim. Law, sec. 429. If Rutherford killed Anderson upon his independent design, appellant would not be responsible for the homicide, and would, therefore, not be subject to punishment. This question is not debatable. See Branch's Crim. Law for collation of authorities, sec. 242. If Rutherford intending to kill McDonald by mistake killed

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Anderson, and this in pursuance to the advice or command of appellant to kill McDonald, the killing as to Anderson would be of no higher nature than murder in the second degree, and it might also be murder in the second degree as to appellant, under the terms of articles 48, 80 and 82, supra. By the terms of Article 80, supra, it is not necessary that the "precise offense" which the alleged accomplice advised the principal to commit, be committed by the principal in order to render the accomplice guilty, but it is necessary that the offense "be of the nature," though it may be "different in degree." By the terms of Article 82, supra, it is also necessary that the principal "shall by mistake or accident commit" such other offense in order to render the accomplice responsible, and this mistake or accident must grow out of or be connected with the original design, or agreement between the principal and the accomplice; it cannot relate to an independent design on the part of the principal in killing another than the one originally contemplated or embraced in the terms of the statute. The independent design of the principal to kill the deceased cannot constitute guilt of the alleged accomplice in any way under the terms of our statute. If the design was to kill A, and by mistake the principal should kill B, it might constitute principal and accomplice guilty. Of course, this would only arise in executing the original design of the principal and accomplice to kill A. If the principal of his own design, and not in accord with the original design to kill A, should kill B, and this of his independent design, it would not constitute the accomplice guilty of the homicide. Mistake or accident would in that character of case be eliminated, and the accomplice would not be guilty. Applying these principles to the allegations in the indictment, we are of the opinion the court erred in admitting the testimony of which complaint is made. The indictment charged the killing of Anderson by Rutherford by reason of the advice, command and encouragement of appellant. Anderson was not contemplated in the design of the agreement between Rutherford and appellant by which McDonald was to be killed, but McDonald was, under the State's theory, and only McDonald, in contemplation. By the terms of Articles 48, 80 and 82, supra, as it was necessary to prove that the purpose of the agreement was to kill McDonald, it was, therefore necessary to so allege in the indictment, otherwise the State's case under the statute was not charged. A direct agreement between the parties to kill Anderson was alleged, but nothing was said in the indictment in regard to McDonald or in reference to any mistake or accident in the killing of Anderson under the belief that it was McDonald. It was essential to prove that the agreement was to kill Anderson under the allegations of the indictment, for the simple reason it was directly and positively so alleged. It was not only not proved that there was an agreement to kill Anderson, but it was positively disproved by all of the evidence. The State's evidence conclusively shows that the killing of Anderson

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by Rutherford was a mistake; that Rutherford thought he was killing McDonald at the time he fired the shot, at least this is the testimony of Rutherford who turned State's evidence, and this was the State's theory. The purpose of the State throughout was to corroborate Rutherford as best it could to show the above state of facts. In fact, the State contended and offered all of its evidence to show that the conspiracy was to kill McDonald, and that the killing of Anderson was a mistake. Therefore, under the terms and allegations of the indictment the testimony to which objection was reserved ought not to have been admitted. Appellant's objections are well taken and ought to have been sustained.

There are other questions arising in the case, some of which are corollaries of the question already discussed. It is unnecessary to discuss those. The decision of those questions will necessarily follow the decision of the main question.

For the reasons indicated the judgment is reversed and the cause is remanded.

Reversed and remanded.

DICK DECKER V. STATE.

No. 2294. Decided February 26, 1913.

1.—Murder—Evidence—Hearsay.

Upon trial of murder, there was no error in not permitting defendant's witness to testify what another had told him about the stick that was used by the deceased in killing defendant's son.

2.—Same—Evidence—Practice—Discretion of Court.

Under Article 718, Code Criminal Procedure, there was no error in permitting the State to introduce a witness after the defendant had closed his evidence, who testified that he had examined the ground over which deceased had traveled immediately after the shooting and found no weapon; this was within the sound discretion of the court; the testimony being clearly admissible.

3.—Same—Charge of Court—Requested Charge.

Where, upon trial of murder, there was evidence that defendant fired four shots at the deceased, there was no error in refusing a requested charge that if either of the first shots were fatal and the fourth was not, that the firing of the latter was immaterial, as all the facts at the time of the killing were admissible and material for the consideration of the jury.

4.—Same—Misconduct of Jury—Statement of Facts—Practice on Appeal.

Under the uniform holding of this court, a statement of facts concerning the misconduct of the jury which is filed after the adjournment of court cannot be considered; besides, there was not error in overruling defendant's motion for new trial on this ground. Following Knight v. State, 64 Texas Crim. Rep., 541.

5.—Same—Sufficiency of the Evidence.

Where, upon trial of murder, the evidence sufficiently sustained the conviction under a proper charge of the court, there was no error.

Appeal from the District Court of Madison. Tried below before the Hon. S. W. Dean.

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Appeal from a conviction of murder in the second degree; penalty, twenty-five years imprisonment in the penitentiary.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.—On question of statement of facts of evidence on motion for new trial; Lucas v. State, decided February 5, 1913; Brewer v. State, decided January 22, 1913, and cases cited in opinion.

PRENDERGAST, JUDGE.—Appellant appeals from a conviction of murder in the second degree with a penalty of twenty-five years in the penitentiary fixed.

On the last Saturday night in April, 1912, at a party, George Decker, the son of appellant, had an altercation or fight with Clarence Jones, the deceased in this case, in which Jones struck George Decker on the side of the head with a stick of wood,—perhaps a fence picket, knocking him down. Later, George Decker was taken home, was up, about and went to church the next day. No doctor was called in until perhaps Monday. From the effects of this lick, however, he died about Tuesday after being struck Saturday night. On Saturday evening of the following week, appellant and Jones were in the town of Madisonville Jones was walking across the streets from some of the stores to the courthouse, which seems to be in the square. Appellant saw him and started towards him, drawing his pistol. Some one or more persons holloed to Jones, "Look out! look out!" Jones then glanced back over his shoulder and started to run, going from appellant. Appellant then shot at him four times, advancing all the time. With the third shot deceased fell. Appellant advanced to within a close distance of him and with both hands took aim and shot at him the fourth time, then turned, walked back and delivered his pistol to the city marshal. From the effects of the wounds Jones died almost immediately. Jones was wholly unarmed. The killing was witnessed by a great many and was proven by several eyewitnesses. Appellant did not testify. His son, however, testified to a state of facts that if believed, tended to show that appellant killed Jones in self-defense. The court properly submitted that to the jury. The great preponderance of the testimony was against self-defense. The court also properly submitted manslaughter and gave a correct charge, to which there is no objection, on murder in the first and second degrees.

There are but few questions raised necessary to pass upon and decide.

By one bill appellant complains that the court refused to permit his witness Puckett to testify what Bob Cox told him, the witness,—that he had gotten the stick that Jones killed George Decker with,

and that Jones told him to get the stick and hide it in order that he might have it in court, and that he went and got the stick behind a log and hid it. The court properly excluded this testimony as hearsay.

By another bill appellant complains that the court, after the defendant had closed his evidence, erred in permitting E. A. Berry to testify in rebuttal, over his objection, "that immediately after the shooting had ceased I went out and examined the ground over which the deceased had traveled from the beginning of the shooting to where he fell, looking for a pistol and I never found any pistol on the ground, and I helped Dr. Speere undress the deceased, and we never found any pistol on his body." The grounds of appellant's objections to this testimony were that it was not in rebuttal, and because it had not been shown that appellant knew deceased did not have any pistol at the time of the shooting. It has uniformly been held by this court, under Article 718 Code Criminal Procedure: "The court shall allow testimony to be introduced at any time before the argument of a cause is concluded, if it appear that it is necessary to a due administration of justice," that it is within the sound discretion of the court to admit testimony as authorized by said statute. Nothing in the record, or bill, indicates that the court in any way abused his discretion in permitting this testimony. The testimony was clearly admissible.

The only other bill in the record is to the refusal of the court to give his first special charge. It is unnecessary to quote this charge. The effect of it was to tell the jury that if either of the three first shots were fatal, and the last, or fourth shot was not, then the firing of any shot after the fatal shot had been fired was immaterial in determining appellant's guilt, and that the jury would not be influenced by the firing of any shots that were not fatal shots after it reasonably appeared to defendant that he was out of danger. This charge clearly was erroneous as all of the facts at the time were admissible and the circumstances under which the last shot was fired was material for the consideration of the jury in determining the degree of guilt of appellant, if guilt was established.

Appellant complained in his motion for new trial that some of the jurors who tried the case were disqualified because they had formed and expressed an opinion of appellant's guilt before they were taken on the jury. This ground of the motion for new trial is not sworn to by anyone and the court could have declined to hear it on that account. There appears in the record what purports to be a statement of the facts heard by the court, however, on this ground of appellant's motion for new trial. It shows that it was agreed to by the respective attorneys in December, 1912, and was approved by the court on December 4, 1912, and filed by the clerk on December 5, 1912. The court adjourned for the term at which appellant was tried on November 16, 1912. Under the uniform holding of this

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court this purported statement of facts can not be considered. Knight v. State, 64 Texas Crim. Rep., 541, 144 S. W. Rep., 967 and cases there cited. It is needless to cite other cases. However, we have looked over this statement of facts and even if it could be considered, in our opinion, the court therefrom was authorized to find and hold against appellant on said ground of his motion.

The only other ground of appellant's motion for new trial is that the evidence is insufficient to sustain the verdict of conviction of murder in the second degree, and claims that it only established manslaughter. We have carefully read and considered all of the evidence. In our opinion it not only is amply sufficient to sustain the conviction of murder in the second degree, but it would have sustained a verdict of murder in the first degree. There being no error the judgment is affirmed.

Affirmed.

LEM WEBB V. STATE.

No. 2303. Decided February 26, 1913.

1.—Theft of Cattle—Evidence.

Upon trial of theft of cattle, there was no error in permitting the State on cross-examination of defendant's witness to show that the head of cattle he testified about was the one which defendant claimed to have raised, etc.

2.—Same—Charge of Court—Recent Possession.

Where the charge of the court on explanation of recent possession instructed the jury to pass upon such explanation directly as was given by defendant, instead of giving the other form of reasonable explanation, there was no error.

3.—Same Misconduct of Jury—Separation of Jury.

Where, upon trial of theft of cattle, the separation of one of the jurors from the other eleven jurors was not such as could have injured the defendant's rights in any way, there was no reversible error.

4.—Same—Evidence—Recalling Witness.

Upon trial of theft of cattle, there was no error in permitting the State to recall the main State's witness after the testimony had been closed and defendant's argument had been closed, and permit him in the presence of the jury to write his name on a piece of paper for the purpose of comparing it with his alleged signature to a tax rendition, and permit same to be considered by the jury; the court offering ample opportunity for cross-examination and additional argument; no abuse of the court's discretion having been shown.

5.—Same—Permitting Jury to Carry Papers with Them.

Upon trial of theft of cattle, there was no error in permitting the jury to carry with them certain papers in evidence when they retired to consider their verdict; besides, the bill of exceptions did not point out any injury to defendant.

Appeal from the District Court of Smith. Tried below before the Hon. R. W. Simpson.

Appeal from a conviction of theft of cattle; penalty, two years imprisonment in the penitentiary.

The following facts taken from the brief of the Assistant Attorney-

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General are substantially correct: The evidence of the State in effect shows that one Gatlin was the owner of said yearling; that he saw appellant looking for cattle in his neighborhood just prior to the time he missed his yearling from the range; that shortly thereafter he made frequent inquiry of appellant if he had seen his yearling; that appellant replied at all times that he had not seen the yearling; that later Gatlin found his yearling in the pasture of one Bell who told him that he got the yearling from appellant. He then sent appellant word to come over and see about the yearling; that appellant came to see him and stated to Gatlin that he did not know that it was Gatlin's yearling until two or three days after he had sold it to Bell; that he thought it was one of his own yearlings, which was very much, or exactly, like Gatlin's yearling, and he then asked Gatlin what it would take to satisfy him. Bell testified to appellant's having sold the yearling and that appellant told him that it was an estray which came to his house when a calf. There was other testimony along this line in behalf of the State. Appellant introduced testimony positively that the yearling sold to Bell was his property and was raised by him. He placed upon the stand his father, Wm. Webb, who testified in his behalf to the effect that he had seen a yearling at appellant's house just like the yearling sold by appellant to Bell after the sale to Bell. This witness was cross-examined by the state and was required to testify over objections of appellant that he had bought a yearling from another party similar to the two yearlings above mentioned, for the purpose, as contended by the State, to show that the witness, Wm. Bell, was undertaking to make a false defense for his son.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—This is a cattle theft conviction. The first bill of exceptions recites that the State introduced the following testimony: William Webb, on cross-examination by the State, testified over the objection of the defendant, that, "during last fall, after the date alleged in the indictment, and after the indictment had been filed in the court, he bought a yearling, about the same size and color of the yearling alleged to have been stolen, from Henry Stokely, paying him $20 for it, bringing it over to his farm." The objections urged were that it was not shown that the yearling, defendant claims to have now, was the yearling that William Webb bought from Henry Stokely, nor had the State connected defendant with this transaction. The court qualified it by stating: "The State sought to show and there was evidence tending to show that the yearling bought by Wm. Webb, was the yearling the defendant claimed to have raised and that he wanted prosecuting witness to look at."

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By reference to the statement of facts it might be discovered that the yearling was bought after the alleged theft and after indictment found, and the evidence might show there was another yearling of the same kind thereafter in possession of the parties. We do not think there is any merit in the bill as it is presented. .

The next bill recites that defendant presented the following instruction which was refused: "You are charged that if you believe from the evidence that the one head of cattle described in the indictment had been stolen from Jack Gatlin, and that recently thereafter, the defendant was found in possession thereof, and when his possession was first questioned, he made an explanation of how he came by it and that you believe that such explanation is reasonable and probably true, and accounted for the defendant's possession in a manner consistent with his innocence, then you will consider such explanation as true and acquit the defendant." The court sufficiently charged this phase of the law and covered all that character of evidence, when he instructed the jury has follows: "If you shall find that the one head of cattle sold by defendant to the witness, Louis Bell, was not the property of Jack Gatlin, or if you have a reasonable doubt as to whether the one head of cattle was owned by Jack Gatlin, you will acquit the defendant. If you shall find that the one head of cattle sold to Bell was the property of Jack Gatlin, yet if you shall find that when defendant took possession of the one head of cattle, he did so under the honest belief that it was his yearling or if you have a reasonable doubt as to whether he so believed you will acquit the defendant." The theory of the defendant, or rather his statement when charged with the theft of the animal,—and the evidence on the trial was to the same effect,—was that at the time he got the animal he thought it was his and got it through a mistake, and that two or three days afterward he discovered that it belonged to Gatlin. This presents the defendant's theory of it, and, we think, sufficiently. In fact, this court, in a number of cases, has suggested it to be a better and safer rule to charge the jury directly on whatever account is given by the defendant, in cases of this sort, instead of giving the other form of reasonable explanation,—that is, if the theory of the defendant was that he bought the animal to charge the jury directly that if they should so find, or had a reasonable doubt to acquit him, or if he took it through mistake and they should so find or have a reasonable doubt of that fact to acquit. Or if he took it under any theory of honesty, whatever that theory was, to so charge the jury directly and also give the defendant the benefit of the resaonable doubt in connection with it. We think the court's charge properly submitted the matter.

Another bill of exceptions recites that after the jury heard the evidence, argument of counsel and received the charge of the court, they retired to consider of their verdict, and later and before a verdict had been agreed upon, eleven members of the jury appeared in

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the Distirct Court room where court was in session, but one of the jurors was not present when the eleven other members made their appearance; that the eleven members were in the courtroom five or ten minutes before his absence was known, and that after a search the deputy found the juror in the third story of the courthouse, above the courtroom, in a separate room from the said courtroom, and the juror was asleep, and by this means the jury were permitted to separate, there being people passing between the said jury and the absent member. This is signed with the statement by the trial judge that the jury made known to the court, through the deputy sheriff who was guarding them, that they wanted a portion of the testimony reproduced, whereupon the court decided that they be brought into open court and after eleven had come into the room, while the stenographer was looking for that portion of the testimony desired, the sheriff called the court's attention to the fact that only eleven jurors were present; that this was only a short time after the jury came in, from three to five minutes; that the sheriff was at once sent to the jury room after the other juror who was in the jury room; no one else was in the room; that the jury room in the new courthouse at Tyler is just over to the rear of the Judge's stand, extended above by a stairway ascending at the rear of the Judge's stand; that no one was with the eleven jurors but the sheriff and no one was with the juror left in the room, and no one spoke to either the eleven or the one, during the brief period. As this bill is explained by the Judge by his qualification,—and the bill was so accepted,—there is no error in the alleged separation.

Another bill recites that Jack Catlin was permitted to be recalled by the State over appellant's objection on the morning of September 25, 1912, after the testimony had been closed on the night of September 24, 1912, and after all of the witnesses had been excused, and after the State had made its opening argument and the defendant had closed his argument, and the defendant's leading counsel, who was most familiar with the facts in said case, had been called out of town, and permitted in the presence of the jury to write his name on a piece of paper for the purpose of comparing it with his alleged signature to a tax rendition, and introduced the signature thus written in evidence; and which testimony was objected to because the testimony had been closed on the night before, and all the witnesses had been excused, and that it would result in reopening the case and bringing the other witnesses back to testify regarding the said signature, because the State had made its opening argument and the defendant had closed his argument, and the leading counsel, who had conducted the examination of witnesses, having made the closing argument for defendant, had left town and would not have opportunity to cross-examine said witness. The court qualifies this bill as follows: "Deft, was represented in court by the firm of Hanson & Butler and R. H. C. Butler, the later being counsel referred to as having left town for his home

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some ten miles in the country. When the State introduced this evidence, the court offered counsel for defendant there in court, an opportunity to rebut same and make another argument to the jury before the district attorney closed the argument for the State." The statute provides that evidence may be introduced, where it is necessary to the administration of the law, at any time before the argument is closed. The objections here do not go to the testimony itself, but because of the fact that the arguments, except the closing argument by the State, had been closed, and the leading counsel had left town. There is no merit in these matters. There is nothing to show that the remaining counsel were not fully capable of cross-examining the witness about his signature. They had ample opportunity offered them, either to examine the witness or introduce testimony, or to be heard again in an argument before the jury.

Another bill recites that the jury were permitted to carry the tax rendition with them, when they went out to deliberate upon their verdict, and the piece of paper containing the signature of Jack Gatlin. This was objected to because it was not such evidence as they were entitled to carry with them into the jury room. The court overruled this and this same bill is qualified as follows: "The tax rendition above referred to was introduced in evidence, the paper with the signature written, and these papers were exhibited to the jury and carried by them to the jury room in their deliberations." As the matter is presented, we are of opinion there is no error shown. What the purpose of this testimony was, is not clear, nor does the bill of exceptions undertake to show how it could have been injurious, or even the effect of the testimony one way or the other or what effect it could have by being carried into the jury room. In fact, the bill is so indefinite that we are unable to see how it could have effected the case, especially injuriously to appellant's cause.

Finding no reversible error in the record, the judgment is ordered to be affirmed.

Affirmed.

T. A. HART v. STATE.

No. 2156. Decided February 26, 1913.

1.—Disturbing Peace—Indictment—Words and Phrases.

Where the word "street" was spelled "stree," in the indictment, the indictment was, nevertheless, sufficient when construed as a whole, and there was no error in overruling a motion in arrest of judgment. Following Bailey v. State, 63 Texas Crim. Rep., 586, and other cases.

2.—Same—Evidence—Res Gestae—Bill of Exceptions.

All the facts and circumstances immediately occurring at the time and place of the main fact are res gestae, and there was no error, upon trial of disturbing the peace, to show that defendant motioned with his hand in connection with the language he used; besides, the bill of exceptions was defective in not showing why the testimony was inadmissible.

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3.—Same—Sufficiency of the Evidence.

Where, upon trial of disturbing the peace, the evidence showed that the defendant willfully used loud and vociferous language in a manner calculated to disturb the inhabitants of a public place, the conviction was sustained.

Appeal from the County Court of Hall. Tried below before the Hon. Jno. D. Bird.

Appeal from a conviction of wilfully disturbing the peace, penalty, a fine of $5.

The opinion states the case.

J. M. Elliott and *A. S. Moss,* for appellant.—On question of introducing testimony as to defendant waiving his hand: Novy v. State, 62 Tex. Crim. Rep., 492, 138 S. W. Rep., 139; Windham v. State, 59 Tex. Crim. Rep., 366, 128 S. W. Rep., 1130.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—Appellant was indicted for disturbing the peace in that on May 18, 1912, he "did then and there unlawfully go into and near a public place, to-wit; a public *Stree* in the town of Memphis, Hall County, Texas, and did then and there unlawfully and wilfully use loud and vociferous language in a manner calculated to disturb the inhabitants of said public place." He waived a jury and submitted his case to the County Judge who fined him $5.

He made a motion in arrest of judgment, claiming that the indictment was fatally defective in that the letter "t" was left off in the spelling of "street" as copied above. Taking the whole indictment, it is perfectly clear that the public place where the offense is charged to have been committed was on one of the streets of the town of Memphis. No one, nor appellant, could possibly be misled by the leaving off of the "t" above specified. The court did not err in not sustaining appellant's motion in arrest of judgment. Bailey v. State, 63 Texas Crim. Rep., 584; Compton v. State, 67 Tex. Crim. Rep., 15, 148, S. W. Rep., 580; Ferrel v. State, 152 S. W. Rep., 901.

The testimony from both sides shows that trouble had arisen between appellant, who was the Marshal of the town of Memphis, and the complaining witness, W. L. McCormick, and that ill-feeling existed between these parties at the time,—May 18, 1912,—the offense was charged; that said McCormick, with some other witnesses, was standing on the sidewalk on one of the streets in the town in front of a barbershop. Appellant went along this sidewalk, passing these parties a few steps; that he then stopped, turned around and after looking at McCormick a few minutes motioned him away from the others with one hand and at the time placed his other hand at or on his pistol. This frightened McCormick and fearing an attack by appellant he immediately ran into the barbershop, appellant following him, holloeing or calling to him to stop, and after getting into the barbershop,

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he continued to demand that McCormick stop, and talked in a loud, excited voice and showed he was mad. It was on this occasion that he is charged and shown by the testimony to have used loud and vociferous language in a manner calculated to disturb the peace.

Appellant has several bills of exceptions to the testimony of McCormick and other witnesses who were present and saw and heard what occurred at the time, detailing what was said and done by appellant and McCormick at this particular time and on this particular occasion. As a sample of one of these bills, we give the substance of his second, which is: While the witness, W. L. McCormick, was on the stand, and on his direct examination by the State, said witness was permitted, over the objection of the defendant, to testify to the following facts, to-wit: "And defendant came back towards me, and motioned with his hand at me for me to step out away from some other boys that were with me." This testimony was admitted over appellant's objections on the ground that it was irrelevant and immaterial, and failed to throw any light upon the offense charged in the indictment in that said indictment charged the defendant with using loud and vociferous language, and that said waive of the hand could not be used as evidence of the force or manner of the language used and that it was prejudicial to his rights. It will be noted by this that the bill,—and each of the others is as fatally defective,—does not give the circumstances and surroundings, and status of the case so that from the bill this court can tell whether this testimony was improper. This testimony and all of the other shown by said bill, objected to is a necessary part of the circumstances and surroundings, acts, and sayings of appellant and said McCormick at the time and is a necessary part of the transaction itself and was all admissible, even if the bills presented it in such way as to require the court to pass upon it. We take it, from appellant's objections and his bills, that his idea was that the State would be restricted to testimony solely to the language used by appellant on the occasion, and whether or not it was loud and vociferous, without in any way telling how and why, and the way the matter came up and what was said and done on the occasion. This is incorrect. Judge White, in his Annotated Penal Code, sec. 1236, discusses this subject fully and cites the authorities. And he lays down this correct proposition: "The 'res gestae,' so called, are the facts and circumstances immediately hovering around, and directly connected with the transaction, occurring at the time and place of the main fact. All which was said or done, or that which occurred, at the time of the offense (homicide) tending in the slightest degree to explain the transaction or conduct or motives of the parties is admissible." Again, he says: "Whatever is said by any of the parties to a transaction at the time of the transaction is a part of the transaction itself and is admissible in evidence as res gestae." It is unnecessary to take up and discuss each of appellant's bills separately. They are all along the same line. All of said testimony was admissible.

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No other point is raised requiring notice or discussion.

The evidence by several of the witnesses shows that on this occasion appellant talked very loud and that he was excited and mad. The evidence is sufficient to sustain the judgment of conviction. The judgment is affirmed.

Affirmed.

CHARLES DAVIS V. STATE.

No. 2216. Decided February 26, 1913.

1.—Murder—Charge of Court—Sufficiency of the Evidence.

Where, upon trial of murder, the evidence was sufficient to sustain the conviction, and the charge of the court presented defendant's theory of defense as made by the testimony as favorable as it was possible to do, there was no error.

2.—Same—Evidence—Other Transactions—Res Gestae.

Where, upon trial of murder, the evidence showed that not more than twenty yards were traveled by defendant from the time the wound was inflicted until he returned to the deceased and kicked her and used the language attributed to him, the same was res gestae and part of the transaction and admissible in evidence.

3.—Same—Evidence—Motive—Animus.

Where, upon trial of murder, it was shown that the defendant immediately after his wife was stabbed, returned to her body and kicked it, using abusive language, the same was admissible to show the animus, motive, and ill-will of defendant toward deceased, and there was no error in the court's failure to limit said testimony. Following Davis v. State, 65 Tex. Crim. Rep., 271, 143 S. W. Rep., 1161.

4.—Same—Evidence—Expert Witness—Opinion.

Where defendant introduced an expert witness and was permitted to show by him all the facts to which he could legitimately testify, there was no error in excluding the opinion of said witness as to whether or not under the circumstances in the case, the wound was intentionally inflicted or accidentally done; this was not a subject of expert testimony.

5.—Same—Practice in District Court.

If defendant expected to illicit any expert testimony, he should have so informed the court at the time, and it was too late to do so after the verdict had been rendered.

6.—Same—Argument of Counsel—Presumption.

Where the argument of State's counsel was not shown in the bill of exceptions to have been harmful to such an extent as to have been reversible error, there was no error, although the remark of counsel that the jury could presume something which had not foundation in the evidence was improper.

7.—Same—Sufficiency of the Evidence.

Where, upon trial for murder, the defendant contended that the wound upon his wife was either self-inflicted or accidental, but the evidence indicated that defendant inflicted the wound and that it would be almost a miracle to have been self-inflicted or accidental, the conviction was sustained.

Appeal from the District Court of Ellis. Tried below before the Hon. F. L. Hawkins.

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Appeal from a conviction of murder in the second degree; penalty, ten years imprisonment in the penitentiary.

The opinion states the case.

Clyde F. Winn, for appellant.—On question of limiting testimony of other transactions: Barton v. State, 13 S. W. Rep., 783; Richards v. State, 3 Texas Crim. App., 423; Branch Criminal Law of Texas, par. 366.

On question of argument of Counsel: Hatch v. State, 8 Texas Crim. App., 416; House v. State, 9 id, 567; Conn v. State, 11 id, 390; Hunnicutt v. State, 18 id, 498; Smith v. State, 55 Tex. Crim. Rep., 563, 117 S. W. Rep., 966; Kirksey v. 61 Tex. Crim. Rep., 298, 135 S. W. Rep., 124.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was convicted of murder in the second degree, and his punishment assessed at ten years confinement in the penitentiary.

The evidence would show that appellant and his wife and several other negroes had just left one Foster's house, and were walking down the road; that appellant struck another negro Woodson in the breast with his hand and remarked: "He was the best God-damned man in the world," he had been drinking that day, and the testimony would indicate that he was laughing when he struck Woodson, but would also indicate that his wife at this time put her arms around and drew him away from the remainder of the crowd, and appellant and his wife walked down the road together. Shortly she was seen sinking to the ground, and get up and walk a little piece further, when she sunk again, and appellant walked back to her, and kicked her. One of the witnesses, Henry Thomas, tells of the occurrence in the following language: "I was along over there when Lula Davis was killed. The first thing that attracted my attention was her squatting down. I was about thirty yards from her at that time. After she got up she walked about seven steps and she fell to the right of the road on her face and then Charlie, he was about twenty yards in front of her at that time, and he turned around and said to her, 'Get up and come on.' She did not say anything. He turned around and came back and got in about three steps of her and says: 'What in the hell are you doing laying here,' and he kicked her. By that time I was in about three or four steps of her and I told him, 'Charlie don't kick that woman,' and he kicked her again and says, 'Get up God-damn you.' I says, 'Charlie don't kick her any more.' He says, 'Yes, I kicked her and whose damn business is it; says there ain't nobody got anything to do with it.' By that time the crowd had got up very close. I and Charlie then tried to help her up. We turned her over and I saw the blood on her dress. I says, 'Charlie you

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have cut this woman' He says, 'No I haven't, I haven't raised my hand.' I says, 'Yes you have, let me see your pocket knife.' He ran his hand in his pocket and gave me his pocket knife. I says 'Yes you have, here's the blood on your pocket knife.' I showed the pocket knife to several others. He said he hadn't done anything to her at all —said he hadn't raised his hand. That was fresh blood on the knife. Defendant said if he had stayed at home this morning as his mind led him to none of this would have occurred. That's all I remember that I saw there or heard. Deceased did not live but about three or four minutes. I saw her—she was stabbed in the neck."

The woman had been stabbed with a knife in the hollow at the base of the *neck,* severing, it seems, one of the carotid arteries. No one saw the blow struck, but the record makes it evident that the wound had been inflicted from the time the deceased drew appellant out of the crowd to where she fell and died, a very short distance. Appellant testified that he and his wife were walking down the road, when his wife (deceased) asked for his knife, and then recites the events as follows: "I says, 'well my knife is in my pocket.' We were armed up together. She just ran her hand down in my pocket and got my knife. I had on a pair of overall pants and jumper. A few minutes after she got the knife, I noticed her opening a snuff box with the knife. She had the knife open and run the knife up under the lid that way and pushed the lid up that way. I noticed her opening the snuff box with the knife and I heard the money rattling in her hand. I says, 'What are you doing with my money.' She says, 'Oh yes, you told me you did not have no money.' I asked you lets go over to papa's—over to Roser. I says, 'I told you that I was just joking when you gave me the money' and we got to tussling and scuffling over the money and I got two or three dollars of the money. She says: 'Oh, I will give it back to you, it is alright any way.' So we just quit tussling and she put the money and knife all back in my pocket and we just armed up and went on down the road together. As we went on down the road after we got through playing, we went on down the road and then I says to her—she says to me: 'You know these people sure treating us nice to be strangers to us.' I says yes they are treating us awful nice to be strangers to us, and then she spoke about getting Lula Franklin to go over to Roser with her, over to her papa's. I says, 'Well you can get her to go if you want to, it don't make any difference to me. She says, 'Well alright, I will get her to go over there.' We were walking along and all at once she just squatted down. I never thought nothing—I just walked on. I thought she was fastening up her shoes or something of that kind—tying up her shoe. We were walking armed up and she went down that way and had her hand on her shoe that way. I looked back and seen she had her hand on her shoe. I kept walking on slow down the road, when I looked around, I says: 'Come on, don't you want to be with me.' That is when I seen her squatting down and I says, 'Come

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on, don't you want to be with me.' She says, 'Sure I want to be with you' and she got up and started where I was and before she got where I was she just eased right down and that is the point where she fell and died. When I noticed her lying down on the ground and looked back the last time and seen her laying on the ground, I says: 'What is the matter with you, get up from there.' Ain't nothing the matter with you.' When she did not say anything, I walked up and put my foot against her and says: 'Get up from here, what do you want to do this way before all these folks.' Of course it made me kind o' angry to think she would lay down that way before all them strange people. I took hold of her with my hand and pulled her up and when I pulled her up, I discovered there was blood running down off of the collar of her dress. The first time I discovered any blood or anything was when I pulled her up. First time I found out she was hurt in any way was after she was laying down on the ground after she was dead at the point where she died. When I saw her on the ground, I told her to get up and I reached down and caught hold of her with my hand when I saw she was hurt. That is the first time I knew she was hurt, and after I knew she was hurt, I just thought then by me and her playing and scuffling over the knife—I knew that was the only way she got hurt—by me and her scuffling."

It is thus seen that appellant by his testimony would have the wound inflicted in an accidental manner, while they were scuffling over the money. On this issue the court instructed the jury:

"You cannot convict the defendant in this case unless you believe from the evidence

(1) That the defendant inflicted the mortal wound upon Lula Davis.

(2) That he did it intentionally, with implied malice aforethought.

If you have a reasonable doubt as to whether defendant inflicted the mortal wound upon Lula Davis, you will acquit the defendant; or, if you believe from the evidence that defendant did inflict the mortal wound upon Lula Davis, but should have a reasonable doubt as to whether he did it intentionally, you will acquit defendant; or, if you believe Lula Davis herself inflicted the wound purposely or accidently upon herself, or if you have a reasonable doubt thereof, you will acquit the defendant."

In addition to this, at the request of appellant, the court gave the following special charge: "You are further instructed that if you believe that Lula Davis was accidently stabbed in a tussle with defendant over some money, or that she stabbed herself while engaged in a scuffle over some money, or that she in any way inflicted the wound upon herself you will acquit the defendant and say by your verdict 'not guilty;' and if you have reasonable doubt thereon you will acquit the defendant." Thus it is seen that the court presented the defense of appellant as made by his testimony as favorably as it was possible to do. However, appellant has several bills of exception in the record,

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the first that the court erred in permitting witnesses to testify about appellant kicking his wife, and the language used by him at the time he did so. By the testimony above copied it is shown that not more than twenty yards were traveled from the time the wound was inflicted until the time appellant kicked his wife and used the language attributed to him. This, we think is conclusive that it was res gestae of the transaction; in fact, it was part of the transaction itself, and the testimony was properly admitted. In Branch's Crim. Law, the rule is said to be that if the acts and declarations appear to spring out of the transaction, if they elucidate it, and if they are made at a time so near it as reasonably to preclude the idea of deliberate design, then they are to be regarded as contemperaneous and are admissible, citing Griffin v. State, 44 Texas Crim. Rep., 314; Castillo v. State, 31 Texas Crim. Rep., 145; Hobbs v. State, 16 Texas Crim. App., 517, and other cases. It is also said by this author that animus, motive and ill-will is never a collateral or irrelevant inquiry, and the testimony as to the acts and conduct of appellant at that time would tend strongly to show the state of feeling toward the deceased, therefore it was not necessary to limit the effect of such testimony thereon at all. (Branch's Crim. Law, sec. 367.) Davis v. State, 65 Tex. Crim. Rep., 271, 143 S. W. Rep., 1161.

Appellant introduced Dr. West and Dr. Cheatham as expert witnesses, and the evidence would authorize the conclusion that they should have been permitted to testify to all facts to which an expert witness would be permitted to testify. Appellant, while Dr. West, was testifying, asked a number of questions seeking to elicit the opinion of Dr. West as to whether or not the wound in the neck, under the circumstances in this case, was intentionally inflicted or accidentally done. One question being, after stating the premises, "What would be your conclusion as to whether that wound was placed upon her purposely or intentionally by defendant or inflicted upon her accidentally in the scuffle over some money?" This was not a subject of expert testimony, and the court did not err in sustaining the objection. The medical knowledge of a man would not aid him in determining whether a wound in the neck was intentionally or accidentally made. And Dr. Cheathom was testifying appellant began to lay a predicate calling for an opinion as an expert, when the court stoped him. Appellant objected and reserved a bill of exceptions, stating that he "excepted for the reasons that it is a matter of expert testimony, going to show whether or not the wound was accidentally inflicted or had been inflicted purposely and intentionally by the defendant in a fight with his wife, and it being a proper question of expert testimony, throwing light on the question as to whether or not the wound was accidently inflicted in the scuffle such as defendant relates, or whether it was purposely inflicted as the State contends." This was the objection stated to the ruling of the court at the time, and as it appears he was trying to elicit Dr. Cheatham's

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opinion as to whether the wound was accidently or intentionally inflicted, the court did not err in the matter. If the appellant expected to elicit any ligitimate expert testimony, he should have so informed the court at the time, and as he did not do so during the trial of the case, it would be too late to do so after the verdict had been rendered.

It appears that the prosecuting officer, during the course of his remarks, said: '"the court will have to charge you that this is a case of circumstantial evidence, but as a matter of fact it is not a case of circumstantial evidence." Appellant excepted to the remarks and requested the court to instruct the jury not to consider same. There are none of the other remarks of the county attorney in this connection shown, but one would naturally conclude that he perhaps followed it up with other argument as to why he thought the testimony placed appellant and deceased into such juxtaposition to each other as to take it out of the rule requiring a charge on circumstantial evidence. Be that as it may, the remarks as copied in the bill of exceptions, isolated and alone, are not such remarks as could have been harmful to defendant. Again, appellant objected to the county attorney using the following language in his argument: "They (appellant's counsel) are talking about there being no motive in this case. How do you know but that as Charley Davis and his wife were walking along down the road there she accused him of being too intimate with some other woman; and, gentlemen of the jury, you have a right to presume that she did." The county attorney ought not to have used this language, but could the use thereof be of that harmful nature that it and of itself would call for a reversal of the case? We do not think so. The only objectionable part is wherein he told the jury they had a right to so presume. This is not the law. A jury has no right to presume anything against a defendant having no foundation in the evidence.

Appellant earnestly insists that the evidence is insufficient to sustain the verdict. He insists that if appellant inflicted the fatal wound deceased would have run, would have cried out, and made some demonstration. Generally this is true, but human experience shows there is no accounting for the conduct of a wife when her husband ill-uses or mistreats her, and the evidence clearly to our minds indicating that appellant inflicted the wound, we will not disturb the verdict, for if he did so, he offers no excuse, or justification for so doing. The place where the wound was inflicted, if the knife was in the hands of his wife, as he contends, it would be almost a miracle if she inflicted it in a scuffle—at the top of the shoulder and base of the neck.

The judgment is affirmed.

Affirmed.

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CLAY LESTER V. STATE.

No. 2229. Decided February 26, 1913.

1.—Theft of Horse—Circumstantial Evidence—Sufficiency of the Evidence.

Where, upon trial of theft of a horse, the evidence was circumstantial, but sufficient to sustain the conviction, there was no error.

2.—Same—Evidence—Circumstantial Evidence.

Where, upon trial of theft of a horse, the evidence was entirely circumstantial, there was no error in admitting testimony that the witness met a man riding a horse and leading another within a few hundred yards of the alleged owner's home after sundown; besides, the bill of exceptions was defective in not pointing out the alleged error.

3.—Same—Charge of Court—Insanity.

Where, upon trial of theft of a horse, the court instructed the jury that if they believed from a preponderance of the evidence that at the time the defendant took the alleged animal he was laboring under disease of the mind to such an extent as that he did not know right from wrong, and did not know that the act of taking at the time he did so, if he did so, was wrong, to acquit the defendant, and then charged the converse of the proposition, there was no error. Following Leache v. State, 22 Texas Crim. App., 279.

4.—Same—Charge of Court—Insanity—Date of Trial.

Where, upon trial of theft of a horse, the defendant pleaded insanity and that he was insane from childhood, and the court properly charged the jury on the question of insanity at the time of the commission of the offense, there was no error in the court's failure to charge specifically on the issue of defendant's insanity at the time of the trial, no affidavit being filed or motion made to submit such issue.

5.—Same—Charge of Court—Lucid Intervals.

Where, upon trial of theft of a horse, the evidence did not raise the question of lucid intervals or partial insanity, but it was contended that defendant was continuously insane throughout his life, there was no error in the court's failure to submit this issue or that the defendant was insane at the time of the trial; especially, as the defendant did not request the court to do so.

Appeal from the District Court of Erath. Tried below before the Hon. W. J. Oxford.

Appeal from a conviction of theft of a horse; penalty, two and one-half years imprisonment in the penitentiary.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.—On the question of insanity: Hurst v. State, 40 Texas Crim. Rep., 378; Nugent v. State, 46 id, 67; Sartin v. State, 51 id, 571; Smith v. State, 55 id, 563; Tub v. State, 55 id, 606.

DAVIDSON, PRESIDING JUDGE.—This conviction was for horse theft. The case is one of circumstantial evidence. The substance of the evidence is to the effect that Timberlake's horse was taken from his premises, and appellant disposed of the horse shortly afterwards some miles away, and was in possession of it the morning following the al-

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leged theft. We deem it unnecessary to go into a detailed statement of the testimony, it being amply sufficient to support the finding of the jury so far as the weight of the evidence is concerned.

The witness Cathcart testified that late on the evening before the 15th of February he was traveling in a wagon with a load of oats, and had been during the day to Mr. O'Neals, close to Alexander in Erath County, where he had gotten the oats. Returning home along the Highland and Dublin road, and when within a few hundred yards of Mr. Timberlake's home, after sundown, he met a man riding a horse and leading another. This was some two or three hundred yards from Timberlake's residence. It was getting dusk and he could not see the horses clearly, but the horse the man was leading was of a dark color, but witness did not notice the animal close enough to describe it further nor did he notice particularly the mane and tail of the horse, nor was he able to tell the size of it. He further stated he did not know the party riding the horse, at least did not notice him as he was in a hurry, and gave the party and the horse the road. He says he could not describe the man riding the horse further than to say he appeared to be a young man, rather slender, squarely built, sitting rather stiff in the saddle. Objection was urged to this testimony because it was heasay, and because witness did not identify the party riding the horse as the defendant, nor the horse being ridden or led as the one alleged to have been stolen, and because the testimony threw no light upon the transaction in question, and because the testimony was irrelevant, and did not tend to connect defendant with the taking of the horse, and was calculated to prejudice his legal rights before the jury. These were all overruled, and the testimony was admitted with the explanation by the court, that this was a case of circumstantial evidence, and the court felt this circumstance admissible along with the others. As the bill is presented we are not able to say that this was error. The court said this was a circumstance to be considered along with the other circumstances in the case. If we were to look to the statement of facts, we are of opinion, while the testimony was not of much moment, still it might be considered along with the other facts, but in any event it was of small matter, and it is not made to appear that this circumstance was not connected up with appellant by the circumstances in the case so as to show this was appellant, and that he was riding or leading Timberlake's horse.

Appellant raises some questions in his motion for new trial, among others, that the court's charge submitting the issue of insanity was not sufficient. The charge of which complaint is made is in the following language: "Now, if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant took the horse described in the indictment from the prosecuting witness, G. W. Timberlake under such circumstances as to constitute such taking theft, and you should further believe from a proponderance of the evidence that at the time the defendant did so he was laboring under disease

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of the mind to such an extent as that he did not know right from wrong, and did not know that the act of taking the horse at the time he did so, if he did so, was wrong, then you will acquit the defendant, on his plea of insanity and so say in your verdict." The objection to this charge is that it is upon the weight of the evidence, and too general, to-wit: that the court told the jury in effect that if the defendant did not know right from wrong, then they would acquit him, when in law he would be required at the time he took the horse, if he did do so, to know the nature and the quality of his act, and to know and understand the consequences of the same. We are of opinion that the charge is not subject to the criticism urged. The criterion in Texas, we think, was submitted by the court sufficiently for an intelligent jury to understand the law, and if defendant did not know right from wrong, he should be acquitted; and it further emphasizes this fact by informing the jury if he did not know the act in taking the horse, at the time he did so, was wrong, than they would acquit him. Under our authorities we are of opinion that this charge was sufficient. While the charge is not as full as is usually given, still it submits the criterion of the law in regard to the test of insanity. The court gave the opposite or converse of this, that if defendant did know that it was wrong to take the animal and did understand the nature of the act, and that it was wrong in taking the animal, then he could not be acquitted under a plea of insanity. It is contended that this is on the weight of the evidence. We do not concur in this view. It is contended in this connection that the only test given by the court as to this plea of insanity was as to whether he knew right from wrong, regardless of whether or not he had mental capacity to know and understand the nature and quality and the consequences of his act, which in law he must know before he can be punished. Of course, the party must be insane, and this he must show usually by a preponderance of the evidence, otherwise he would be guilty. We do not believe this is a charge on the weight of the evidence, but taking the whole charge together, it was sufficiently specific as not to mislead the jury. See Leache v. State, 22 Texas Crim. App., 279. The Leache case has been followed in regard to this matter in subsequent decisions.

Another contention is, that the court erred in not instructing the jury that if appellant was insane at the date of his trial, they could not convict him on the theory that under the statute no person shall be convicted of a felony if after the commission of the offense he becomes insane. This issue was not in the case, that is, that he become insane after the commission of the offense. All the evidence in the case shows that if he was insane at all, that he was insane from his early childhood, and that it was a continuous and unbroken insanity from childhood to the time of his trial. Where this is the case under the facts it is not error for the court to fail to instruct the jury upon the theory presented by this exception.

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In the case of Kirby v. State, 150 S. W. Rep., at page 455, this court decided the question adversely to appellant. That opinion recites: "The next bill relates to the refusal of the court to instruct the jury that, if they believe the defendant was now insane (that is, at the time of the trial), they would so return their verdict and inquire no further. In support of his contention appellant cites us to the case of Chase v. State, 41 Texas Crim. Rep., 560, 55 S. W. Rep., 833; but a careful reading of that case will demonstrate that it holds adversely to his contention. In that case a similar instruction was sought; but the court held that inasmuch as the evidence indicated that defendant in that case was as much insane at the time of the commission of the offense as at the time of the trial, and the court had instructed the jury that if defendant was insane at the time of the commission of the offense to acquit, there was no error. In this case the only evidence as to appellant's insanity at the time of this trial is the testimony of Dr. West, and he testified that he thought appellant was as insane now on that point testified in regard to as he was at the time of the commission of the offense, only that he probably was more violent at the time the offense was committed, and the court instructed the jury that if they found appellant was insane at the time of the commission of the offense to acquit him. Their finding him not insane at the time of the commission of the offense necessarily included a finding that he was not insane at the time of the trial, as all the circumstances upon which it was sought to prove that fact occurred prior to the commission of the offense, and the physician bases his opinion wholly upon those matters." As before stated, in the instant case, if appellant was insane at the time of the commission of the offense, he had been insane for years before, and was insane at the time of the trial, the theory of the defense being that he was insane from early childhood, and the reasons are given in the testimony, which we deem unnecessary to state, but it was the contention throughout the trial that appellant had always been insane. Under this state of case, we are of opinion it was not necessary to charge the jury specifically on the issue of his insanity at the time of the trial, and besides there was no issue made specifically by the defendant, no affidavit filed, and no steps taken to illustrate that question before the jury. It is simply raised on the motion for new trial and criticism of the court's failure to charge that aspect of the law. The question of lucid intervals or partial insanity, or insanity at one time and lucidity at another is not in the case. The insanity, as stated above, covers practically his life up to and including the trial.

It is contended also that the evidence is insufficient to support the verdict. It is stated in the ground of the motion for new trial as follows: "The proof showed by all the witnesses who testified for the defendant and by Dr. Chilton that the defendant was insane at the date of the trial and had been insane for a number of years prior thereto, and the only proof in the case on this question offered by the

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State, was the testimony of some witnesses who had lived at Comanche and had seen defendant there for the past two or three years; none of these witnesses claimed to know anything about mental diseases, and none of them claimed to know or understand anything about insanity and were non-experts, while the proof showed that those who had lived with the defendant all his life, and nursed and treated him swore he was and had been insane for a number of years." This is the statement in the ground of the motion for new trial. The State introduced some evidence showing the defendant was able to attend to business, was not bright, but he was able to drive a delivery wagon and do a few things of that sort, and did perform acts of that character, but during all this time the defendant's evidence went to show that he was insane. While the court might properly have submitted the issue to the jury, yet in the attitude the evidence presents it, as we have stated above, we think it is not reversible error that the court did not submit the insanity of defendant at the time of the trial, especially so as the defendant did not request it to be done, and no affidavit was filed under the statute asking the issue be especially tried by the jury.

Believing there is no reversible error in the record, we are of opinion the judgment ought to be affirmed, and it is so ordered.

Affirmed.

Henry Polk v. State.

No. 2280. Decided February 26, 1913.

1.—Policy Game—Indictment—Gaming Statutes.

Under Article 558, Revised Penal Code, a policy game is included within the gaming statute and is prohibited from being kept or exhibited directly or indirectly for the purpose of gaming, and an indictment in the terms of said statutes, alleging that the policy game was kept and exhibited for the purpose of gaming is sufficient. Following Morris v. State, 57 Texas Crim. Rep., 163, and other cases.

2.—Same—Statement of Facts.

In the absence of a statement of facts, the sufficiency of the evidence cannot be reviewed.

Appeal from the Criminal District Court of Dallas No. 2, tried below before the Hon. Barry Miller.

Appeal from a conviction of keeping a policy game; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, Presiding Judge.—The indictment contains two counts; the first charges that appellant did unlawfully and directly

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keep and exhibit for the purpose of gaming a policy game; the second count charges that he did unlawfully through his agents Will Johnson and Lon Geights keep and exhibit for the purpose of gaming a policy game, etc.

Motion was made to quash because the indictment charges no offense against the law: There is no such game known as a policy game, and because "policy" as it is known and has been judicially defined is not a game but is a lottery, and partakes of the true nature of a lottery; and because same is known and understood and as same has been judicially defined cannot be kept, dealt and exhibited for the purpose of gaming; and because "policy" as same is known and as same has been judicially defined is not gaming and neither the persons who buy and sell numbers and tickets nor the persons who conduct drawing either play at or bet at a game.

The "game of policy," as it was heretofore been understood, partook of the nature of a lottery. However, the Legislature has seen proper to make a change in this matter, and to this end enacted the following statute: Article 558, Revised Penal Code: "If any person shall, directly or as agent or employe for another or through any agent or agents, keep or exhibit for the purpose of gaming, any policy game, any gaming table, bank, wheel or device of any name or description whatever, or any table, bank, wheel or device for the purpose of gaming," etc., he shall be punished. It was within the power and authority of the Legislature to include in the above statute what is known as a "policy game," and give it a definition. Just how far the Legislature may go in these matters it is not necessary here to determine. They have included a policy game within this statute, and prohibited its being kept or exhibited directly or indirectly for the purpose of gaming. The facts are not before us as to how this game was carried on or what it was. In fact there is no statement of facts sent up with the record. The shifting and changing rules of games has made it necessary at times for the legislative department and they have felt it incumbent upon them, to provide new definitions and punishments by reason of these changes in the game. Whether this game as charged was really a banking game or not cannot be determined by this court without the facts before it. The rules of the game may have been changed so that it has assumed the nature and character of a banking game. Inasmuch as the statute specifically enumerates this game among those which are prohibited from being kept and exhibited, we are of the opinion that the pleader in drawing the pleadings was justified in charging it in the terms of the statute. It has been held sufficient in charging the violation of this statute, that is, where games are prohibited from being kept and exhibited for gaming purposes, to simply charge that the named game was kept and exhibited for the purpose of gaming. See Campbell v. State, 2 Texas Crim. App., 187; Parker v. State, 13 Texas Crim. App., 213; Jefferson v. State, 22 S. W. Rep., 148; Tellison v. State, 35

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Texas Crim. Rep., 388; 33 S. W. Rep., 1082; Ranirez v. State, 40 S. W. Rep., 278. It has also been held sufficient if the indictment charges the accused with keeping and exhibiting for the purpose of gaming a gaming table and bank. Adams v. State, 29 S. W. Rep., 384; Perkins v. State, 33 S. W. Rep., 341; Rabby v. State, 37 S. W. Rep., 741; Moon v. State, 37 S. W. Rep., 741; Kinney v. State, 47 Texas Crim. Rep., 496; Morris v. State, 57 Texas Crim. Rep., 163. These cases are collated in section 3 of the recent work gotten out by Mr. Branch of the Houston Bar, who is the author also of Branch's Texas Criminal Law. This work is entitled the "Trial Brief based on the Texas statutes." Mr. Branch has compiled this work in his usual thorough and felicitous style, and has given careful and thoughtful attention in collecting the cases and citing them under their proper heading.

We are of opinion that the indictment is sufficient under the statute and the adjudicated cases. Whether the facts would sustain the charge is a different proposition, but we are unable to revise it because of the want of the testimony before us. Appellant was convicted under the first count for himself directly keeping and exhibiting the game. We are of the opinion that the motion to quash was not well taken, and the court was not in error in overruling it.

The judgment will be affirmed.

Affirmed.

ANDREW WILSON V. STATE.

No. 2313. Decided February 26, 1913.

1.—Assault to Murder—Evidence—Conspiracy—Co-Conspirators.

The acts and declarations of co-conspirators prior to the consummation of the completed act are all admissible in evidence both to show the conspiracy and the animus behind the act.

2.—Same—Case Stated—Declaration of Co-Conspirator.

Where, upon trial of assault to murder, the evidence showed that on the afternoon of the day of the assault the party injured, on the one side, and the defendant, his brothers, and others on the other side, had a fist fight; that the party injured knocked down one of the defendant's brothers, and that in the evening after this the defendant and his brothers collected at a place near the house where the party injured was; and defendant's companions in the previous fight went to said house and made some threats there against the party injured and finally brought him to the defendant and his brothers, shortly after which the assault occurred, there was no error in admitting all these matters.

3.—Same—Evidence—Lying in Wait—Conspiracy.

Upon trial of assault to murder, there was no error in admitting testimony as to tracks surrounding the scene of the assault, which tended to show that defendant and his brothers were lying in wait for the deceased.

4.—Same—Evidence—Contradicting Witness.

Where, upon trial of assault to murder, the State was permitted to introduce defendant's applications for continuance, and there was nothing in said applications which would contradict any statement made by defendant while testifying in his own behalf, the same were inadmissible in evidence.

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5.—Same—Aggravated Assault—Charge of Court—Insult to Female Relative.

Where, upon trial of assault to murder, there was evidence that defendant's actions in meeting the party injured was based upon insulting conduct to his stepdaughter, and that this was the first meeting of the parties, the court's failure to charge on aggravated assault was reversible error.

6.—Same—Self-Defense—Charge of Court.

Where, upon trial of assault to murder, the State claimed a waylaying by the defendant, but the defendant denied this and claimed self-defense, which was supported by his evidence, the court's failure to charge on self-defense was reversible error, notwithstanding such claim of self-defense might probably not be true.

7.—Same—Charge of Court—Principals—Conspiracy.

Where, upon trial of assault to murder, the State's evidence showed a conspiracy between defendant and others to seriously injure the assaulted party, the court properly charged on the law of principals, but failed to submit the theory of the defense, which was aggravated assault and self-defense, and this was reversible error.

8.—Same—Transcript—Practice on Appeal.

See opinion showing that the transcript was unnecessarily voluminous. A record on appeal should present the real issues in the case.

Appeal from the District Court of Carson. Tried below before the Hon. F. P. Greever.

Appeal from a conviction of assault with intent to murder; penalty, five years imprisonment in the penitentiary.

The opinion states the case.

Willis & Willis, for appellant.—On question of conspiracy: Guffee v. State, 8 Texas Crim. App., 187; Trimble v. State, 33 Texas Crim. Rep., 397; Ripley v. State, 51 id, 126; McAnnally v. State, 73 S. W. Rep., 404; Burrell v. State, 18 Texas, 713; Blain v. State, 30 Texas Crim. App., 702; Figaroa v. State, 58 Tex. Crim. Rep., 611, 127 S. W. Rep., 193; Bryan v. State, 49 Texas Crim. Rep., 200; Jackson v. State, 20 Texas Crim. App., 190; Green v. State, 49 Texas Crim. Rep., 238; Cooper v. State, 48 id, 608; Sharp v. State, 29 Texas Crim. App., 211; Choice v. State, 52 Texas Crim. Rep., 285; Dungan v. State, 39 id, 115; Downing v. State, 61 id, 519; Yarbrough v. State, 66 Tex. Crim. Rep., 311, 151 S. W. Rep., 545; Schackey v. State, 41 Texas Crim. Rep., 255; Clifton v. State, 46 id, 18; Crook v. State, 27 Texas Crim. App., 198; Rhodes v. State, 39 Texas Crim. Rep., 332; Wright v. State, 43 Texas, 170; Bluman v. State, 33 Texas Crim. Rep., 43; Menges v. State, 25 Texas Crim. App., 710; Cortez v. State, 24 id, 511.

On question of admitting evidence of tracks: Liles v. State, 58 Tex. Crim. Rep., 310, 125 S. W. Rep., 921.

On question of admitting applications for continuance: Lauders v. State, 63 S. W. Rep., 557; Askew v. State, 59 Tex. Crim. Rep., 152, 127 S. W. Rep., 1037; Clifton v. State, 46 Texas Crim. Rep., 18.

On question of court's failure to charge on aggravated assault:

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Moore v. State, 33 Texas Crim. Rep., 306; Stevens v. State, 38 id, 550; Chatman v. State, 40 id, 272.

On question of court's failure to submit self-defense: Monson v. State, 63 S. W. Rep., 647; Voight v. State, 53 Texas Crim. Rep., 268; Parnell v. State, 50 id, 419; Thomas v. State, 48 id. 67; Palmer v. State, 47 id, 268; Chapman v. State, 45 id, 479.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was convicted of assault to murder and his punishment assessed at five years confinement in the State penitentiary.

It appears that on the afternoon of the day that the shooting occurred at night, Jeff Wilson, Joe Allen and Dorsey Jones met at a point near the residence of Mr. Losey. That a fight between Jeff Wilson and Dorsey Jones occurred, in which Dorsey knocked Jeff Wilson down. Jones left and went to the home of Mr. Crites where he was working. It appears that after this fight, Jeff Wilson, Bob Wilson, Joe Allen and appellant were all seen at the home of L. A. Allen, the father of Joe Allen, and they all left there about the same time. Between the time of the fight in the afternoon, and the shooting at night, Joe Allen went to the home of C. B. Warner and asked him if Dorsey Jones was there, and upon being told that he had gone, Joe Allen remarked, "We are going to get him." While at the home of L. A. Allen, Bob Wilson asked how long Dorsey Jones had been gone, and when told, said, "We are going to get him." Mr. Allen then talked to him about the fight between Dorsey Jones and Jeff Wilson and advised him to drop it, when Bob Wilson replied, "Well, it ain't settled, Mr. Allen." They left this place going in the direction of Mr. Crites,' the three Wilsons being in a buggy and Joe Allen horseback. It appears that Joe Allen went to the residence of Mr. Crites alone, and called Dorsey Jones and asked him for some money that was owing him. Jones did not have the money, and Allen suggested that he could probably get it from a certain man and he needed it. Jones agreed to go and see, and in going to the place where the horses were situate, he came up on the three Wilsons in the buggy, in a little valley, when the difficulty occurred.

In a number of bills of exceptions objections were made to the statements of Joe Allen made to Mr. Warner, the statements made by Bob Wilson to Mr. Allen, and the evidence about the fight between Jeff Wilson and Dorsey Jones that afternoon, and the acts and conduct of Joe Allen at the residence of Mr. Crites. As the State's theory of the case is that all three of the Wilsons and Joe Allen were acting together in a conspiracy to take the life of Jones because of the difficulty between him and Jeff Wilson that afternoon, there was no error in admitting all this testimony. The acts and declarations of co-conspirators prior to the consummation of the completed act are

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all admissible in evidence both to show the conspiracy, and the animus behind the acts. As to the fight that afternoon, as, according to the State's contention, the subsequent assault took place as an act of revenge for Jones knocking down Jeff Wilson that afternoon, it became admissible for the jury to determine whether or not the latter assault grew out of it, and the parties were attempting to kill Jones because thereof.

The testimony of Sam Hunter as to the condition of the ground where the assault occurred, the tracks, etc., found there, was properly admissible in evidence. The record shows that appellant was in the buggy at this point, and this testimony would have a tendency to show whether or not they were at this point waiting for Jones while Allen went to Mr. Crities' home after Jones. However, we cannot understand upon what theory the court admitted the two applications for a continuance made by appellant. It is true he took the stand and admitted that at the former term he had applied for a continuance on account of the absence of Allen, and stated that he expected to prove by him that Dorsey had made insulting remarks about his stepdaughter, and that he could prove this by no other witness, while at this term of court he applied for a continuance on account of the absence of his stepdaughter, alleging that she would testify that Jones had insulted her by making to her improper proposals. Appellant, while testifying, had explained this and said at the time the former term of court was held, his stepdaughter had not told him about the insulting proposals made to her, but had told him since he filed the first application for continuance. These applications would not contradict that statement, nor any statement made by appellant while testifying in his own behalf, and the court erred in admitting them in evidence. If when he testified on this trial that his stepdaughter had told him of improper proposals being made to her, and he was asked if at the former term of court he had not sworn that he could prove these facts by Joe Allen alone, he had denied doing so, so much of the application as showed he had so sworn would have been admissible. But when the question was propounded to him he admitted he had so sworn and stated that his stepdaughter had told him since that time and the application for a continuance, or any portion thereof would not tend to impeach his testimony on this trial. And the same may be said of the application made at the term of court at which he was tried. Nothing therein contained would tend to impeach his testimony on the trial and we are at a loss to understand why the applications were admitted in evidence.

The court failed to charge on aggravated assault, and in this we think the court erred. It is true the evidence offered in behalf of the State would make a case of assault to murder, but appellant testified that he was informed that Jones had made very insulting remarks about his stepdaughter, by both his brother, Jeff, and by Joe Allen; that after hearing of these remarks he went to see Jones about the

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matter with a view of demanding an explanation from him. If appellant was informed that Jones had used insulting language about his stepdaughter, and imputed to her a want of chastity, and this produced in him anger, rage or resentment to the extent of rendering him incapable of cool reflection, and he, or those acting with him, had killed Jones within an hour after appellant had been so informed, at the first meeting, the issue of manslaughter would have been raised as to appellant, it being his stepdaughter that the want of chastity was alleged to have been imputed to. And if this is true, then as the assault did not produce death, the same circumstances, if true, would reduce the offense to an aggravated assault. Appellant's testimony raised this issue, and the court under appropriate instructions should have submitted it to the jury.

Again, appellant complains that the court did not submit the issue of self-defense. As hereinbefore stated the evidence offered in behalf of the State, made the offense assault to murder, without excuse or justification,—a case of way-laying. But appellant testified he did not send Joe Allen to the house after Jones; that he did not know he was going to that house, and while driving towards Crites' to see Jones about the insulting language he had used in regard to his stepdaughter, he met him in the road and asked him what he meant by the language he had used about his stepdaughter, when Jones denied using the language, and asked him who had told him (appellant) that he (Jones) had done so. Upon appellant replying that Joe Allen and Jeff Wilson had so informed him that evening, Jones replied that it was a "God-damn lie," ran his hands in his pocket, and acted as if he was going to spring at him, when he, appellant, stopped him (Jones) and some one fired the shot that inflicted the wound. The prosecuting witness says that appellant did not fire the shot, but that he held him while his brother shot him. The evidence, we think, called for an appropriate charge presenting this issue to the jury. It may be the court did not believe it, and we think the circumstances would indicate that it is probably not true, yet appellant so testifies, and the jury should have been told if appellant had been informed of the insulting language, and whether true or false, if he believed it to be true, and he went to see Jones to demand an explanation of his conduct, and when he did ask for an explanation, Jones, by his acts and conduct, at that time led appellant to believe that his life was in danger, and he had not entered into a conspiracy to take the life of Jones, he would be guilty of no offense.

There were well defined theories in the case,—that offered by the State and that presented by defendant. The evidence offered by the State would support the theory that there was a conspiracy formed by appellant, Fred and Bob Wilson, and Joe Allen to take the life of Dorsey Jones because he had whipped Fred Wilson that evening, and in pursuance of that conspiracy they had gone to the home of Jones; three of them stopped in the valley, while the fourth went to

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the house and got him, and caused him to go by this valley, when he was assaulted; consequently, the court did not err in charging on who are principals in the commission of an offense. Consequently, the court did not err in admitting all testimony going to prove those issues and submitting in his charge that theory to the jury. On the other hand, the defense of appellant was he entered into no conspiracy; that he did not shoot Jones and did not know anyone else was going to do so, when it was done; that when he approached Jones and asked him about the language he says he had been informed Jones had used in regard to his stepdaughter, Jones ran his hand in his pocket and acted as if he was going to spring towards them, when the shot was fired. The defenses offered were not submitted to the jury, and they should have been, under appropriate instructions.

There are many other bills of exceptions in the record, appellant reserving seventeen bills of exception to the evidence, he asked thirty special instructions, and there are a number of grounds in the motion, complaining of the charge of the court, making a voluminous record, much larger than was necessary to present the real issues in the case. However, we have carefully examined the entire record, and each ground in the motion for new trial, but do not deem it necessary to discuss any of the others. The rulings on the questions already discussed will furnish a criterion by which the case should be tried, as we have discussed all the material points raised.

Reversed and remanded.

Reversed and Remanded.

W. M. STEPHENS v. STATE.

No. 2312. Decided February 26, 1913.

Rehearing denied March 26, 1913.

1.—Theft of Horse—Continuance—Want of Diligence.

Where defendant's application for continuance showed a want of diligence for applying for proper process, and that it was hardly possible that the alleged witness could have been procured by further postponement of the case, there was no error in overruling the motion.

2.—Same—Evidence—Recent Possession—Explanation—Charge of Court.

Where, upon trial of theft of a horse, the defendant claimed that he had traded therefor, and the court charged the jury that if they believed that he traded for said horse or had a reasonable doubt to acquit him, there was no error in refusing a special charge on the same question couched in a more formal manner. Following Hinsley v. State, 60 Texas Crim. Rep., 565.

3.—Same—Indictment—Grammatical Errors—Words and Phrases.

Grammatical errors present no ground for quashing an indictment as long as it can be rendered certain, and the omission of the word, "of," in the latter part of the indictment presented no error.

4.—Same—Sufficiency of the Evidence—Reasonable Explanation.

Where defendant gave more than one explanation of his possession of the alleged stolen horse, the conflict in such statements could be considered by the

jury and the conviction will not be reversed on appeal. Following Cabral v. State, 57 Texas Crim. Rep., 304, and other cases.

Appeal from the District Court of Travis. Tried below before the Hon. Chas. A. Wilcox.

Appeal from a conviction of theft of a horse; penalty, five years imprisonment in the penitentiary.

The Opinion states the case.

Thelbert Martin, for appellant.—On question of continuance: Ray v. State, 13 Texas Crim. 51.

On question of court's charge on explanation: Bond v. State, 23 Texas Crim. App., 180; Boyd v. State, 24 id, 570; Taylor v. State, 27 id, 463; White v. State, 28 id, 71.

C. E. Lane, Assistant Attorney-General, for the State.—On question of indictment: Conoly v. State, 2 Texas Crim. App., 412; Martin v. State, 21 id, 1; Buchanan v. State, 24 id, 195.

HARPER, JUDGE.—Appellant was prosecuted and convicted of the theft of a horse, and his punishment assessed at five years confinement in the State penitentiary.

The appellant complains that the court erred in overruling his second application for a continuance. As qualified by the court the bill presents no error, the court stating, "the subpoenas referred to in the motion had been returned considerable time before the trial, the return showing the witnesses had not been found, and no further process issued nor asked for up to the time of the trial." In addition to this the application itself shows that the residence of the witnesses are not known to appellant, and if he had not located them by the time this case was called for trial, it is barely possible he would be able to do so by a further postponement of the case.

It is shown by another bill that while W. C. Castleberry was testifying he was asked what explanation, if any, appellant offered of his possession of the stolen horse at the time of his arrest, which objection was by the court sustained. Later during the trial, however, the court revised his ruling in this respect, and permitted the witness to state fully all that appellant stated at the time, and under such circumstances the bill presents no error. On the trial, appellant's contention was that when found in possession of the stolen horse he gave as an explanation of his possession, that he had traded for the horse, and got him from a man near Junction City, whose name he did not know or remember. On this issue the court instructed the jury: "If you believe from the evidence that the defendant traded for said horse, or if you have a reasonable doubt as to whether or not he traded for said horse, then you will acquit him." This character of charge on the submission of this issue has been frequently approved by this court, and there was no error in refusing the special charge in regard to explanation of possession of recently stolen property.

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Hinsley v. State, 60 Tex. Crim. Rep., 565, 132 S. W. Rep., 779.

The only other question raised by the motion for new trial are the sufficiency of the indictment, and that the testimony does not support the verdict, in that defendant gave a reasonable explanation of the stolen horse. Where defendant gives more than one explanation, the conflict in such statements may be considered by the jury in determining whether they are reasonable and probably true, and under such circumstances it has been held that the judgment will not be reversed on appeal. Cabral v. State, 57 Texas Crim. Rep., 304; Von Emmons v. State, 20 S. W. Rep., 1106.

Grammatical errors present no grounds for the quashing of an indictment, unless such errors render the indictment uncertain and one is unable to determine the charge intended. The ommission of the word "of" in the latter part of the indictment presents no error, when by reading the entire indictment the intent and meaning is made perfectly clear. Bishop's Crim. Pr., vol. 1, secs. 354, 356 and 357.

The judgment is affirmed.

[Rehearing denied March 26, 1913.—Reporter.]

Affirmed.

BERT CAMERON V. STATE.

No. 2008. Decided January 29, 1913.

Rehearing denied February 26, 1913.

1.—Murder—Jury and Jury Law—Juror's Absence.

Where, upon trial of murder, it was shown by the record on appeal that the juror for whom defendant moved to quash the venire was absent from the county and it was impossible to have him brought into court, there was no error in overruling the motion to quash and proceeding with the trial. Following Thuston v. State, 18 Texas Crim. App., 26, and other cases.

2.—Same—Evidence—Conspiracy—Declarations of Co-Conspirator.

Where, upon trial of murder, the evidence showed that the brother of defendant and the latter were acting together at the time of the commission of the homicide, there was no error in admitting the declarations of said brother when asked about the trouble between defendant and deceased that it was not going to leak out from them, but that it might leak out after a while, and which was made a few days before the killing in the absence of defendant; the court properly limiting this testimony to a conspiracy; besides, the ill-will of defendant towards the deceased was amply shown by other testimony.

3.—Same—Evidence—Insulting Conduct to Female Relative—Manslaughter.

Where, upon trial for murder, defendant's contention was that he had been informed by his wife that the deceased raped her and that he killed him on first meeting, there was no error in permitting the State to introduce testimony which rendered it impossible for deceased to have committed such rape at any time claimed by defendant, and that it was unlikely that she had communicated such fact to the defendant and that this contention of the defendant was probably not true; the court properly submitting the issue to the jury and limiting the testimony to the credibility of the witness.

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4.—Same—Evidence—Cross-Examination.

In the absence of a bill of exceptions, the court's action in permitting certain questions to be asked the wife of the deceased on cross-examination cannot be reviewed.

5.—Same—Murder in the First Degree—Charge of Court.

Where, upon trial of murder, the court's charge on murder in the first degree was in accordance with approved precedent and not on the weight of the evidence, there was no error. Following Alexander v. State, 40 Texas Crim. Rep., 395.

6.—Same—Manslaughter—Charge of Court—Reasonable Doubt.

Where, upon trial of murder, the court's charge on manslaughter, when taken as a whole, was correct and applicable to the facts, there was no error, the court also applying the reasonable doubt between murder and manslaughter.

Appeal from the District Court of Eastland. Tried below before the Hon. Thomas L. Blanton.

Appeal from a conviction of murder in the first degree; penalty, life imprisonment in the penitentiary.

The opinion states the case.

Scott & Brelsford, for appellant.—On question of overruling motion to quash venire: Ripley v. State, 51 Tex. Crim. Rep., 126, 100 S. W. Rep. 943; Lyon v. State, 89 S. W. Rep., 849; Webb v. State, 83 S. W. Rep., 394; Cortez v. State, 6 S. W. Rep., 546.

On question as to admitting evidence as to whereabouts of deceased: Morrison v. State, 61 Texas Crim. Rep., 223; Fassett v. State, 41 Texas Crim. Rep., 400; Roquemore v. State, 59 id, 568.

On question of the court's charge on manslaughter: Orman v. State, 22 v. Texas Crim. App., 604; Stewart v. State, 52 id, 273; Gillespie v. State, 53 Texas Crim. Rep., 167; Akin v. State, 56 id, 324.

On question of court's charge on murder in the first degree: Jones v. State, 29 Texas Crim. App., 338; Cordono v. State, 56 Texas Crim. Rep., 447.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was prosecuted and convicted of murder in the first degree, and his punishment assessed at imprisonment in the penitentiary for life.

In the first bill of exceptions appellant would show that one of the names of jurors on the venire list served on him was one G. T. Hammett, and the sheriff when calling the list stated that this juror had been reported served by mistake, when appellant moved the court to quash the venire, or to hold the venire until said juror could be summoned and brought into court. In approving the bill the court states that the juror Hammett was out of the county, and it was impossible to have him summoned. The qualification further shows that the appellant secured a jury without exhausting but eleven of

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his challenges. Appellant cites us to the case of Osborne v. State, 23 Texas Crim. App., 431, as sustaining his contention. From a careful reading of it, we do not think it does do so, but on the contrary sustain the action of the court in proceeding with the trial. In that case it was held that "it will be readily admitted that the cause which will excuse ought not to be occasioned by the action of the court in derogation of the prisoner's right, but something over which the court has no control." In this case it is shown that the juror was absent from the county, and it was an impossibility for the court to have had him brought into court, and the law requires the impossible of no man or court. In the Thuston case, 18 Texas Crim. App., 26, the same learned judge who wrote the opinion in the case cited by appellant, says: "If upon the call of the list a juror is absent, and it be made to appear satisfactorily that his absence is from *sickness or other unavoidable cause,* the court may undoubtedly excuse his attendance." It was not shown that the juror was out of the county by the connivance or consent of the court, consequently when it was shown that he was out of the county, it presented one of those unavoidable causes which the law recognizes as grounds for the court to excuse the juror.

The court permitted Bob Head to testify that on Sunday before the killing he asked Beach Cameron (a brother of defendant) what the trouble was between defendant and deceased, and Beach Cameron replied: "It ain't going to leak out from us—it may leak out after awhile, but it will never come from us." The court in approving the bill objecting to this testimony qualifies it thus: "The above statement was made by Beach Cameron to Bob Head on Sunday night prior to the killing on Friday morning. On Tuesday prior to the killing, Bert Cameron borrowed a single-barrel shotgun and some cartridges from Bob Head, and returned the gun on the day after the killing. It was shown by the witness Clemmer that just a few minutes before the killing he saw the defendant turn into the lane riding a horse in a tolerably rapid lope, toward the place where the homicide occurred, and that at the same time he saw Beach Cameron running north in the same direction, and that within half hour thereafter he heard of the killing. At the very time that deceased was shot and killed, his sister, Fay Stovall, saw Beach Cameron nearly at her horse's head, running up the road with his hands in his jumper pockets, and Beach caught her horse and turned him around, and then Beach and Bert got on Bert Cameron's horse together, and Beach said, 'Go home,' and they rode off together. There were bushes and trees on the side of the road where Beach appeared, and the evidence of the deceased's sisters showed that Beach must have been in this wood at the time the fatal shot was fired, else they could have seen him in the road, as the vision in same was clear for half a mile. It was the opinion of the court that the above made the statement admissible, but the court properly limited it to whether or not

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there was a conspiracy. But the defendant proved by his own witness, Mary Delaney, all about the fight between Bert Cameron and the deceased, occurring in the spring before the homicide, hence if proof of the conspiracy was not complete the statement of Beach Cameron to Head could not have been hurtful or prejudicial to defendant.''

In his charge, the court instructed the jury: ''The State had been permitted to introduce in evidence certain alleged acts, conduct and statements of one Beach Cameron, and I charge you that you cannot consider any of such evidence in this case for any purpose whatever, unless you should first believe and find from the evidence beyond a reasonable doubt that prior to the homicide, a conspiracy had been entered into, by and between the said Beach Cameron and the defendant, to kill the deceased, and that in pursuance of an agreement, the said Beach Cameron and the defendant acted together in causing the death of said Sutton Stovall, if in fact they did do so, or if, in fact, there was any such agreement.'' An acting together by two or more persons may be proven by circumstantial evidence; in fact, often cannot be proven in any other way, and when that is the contention of the State, it is proper to admit the circumstances going to show that state of facts. All the evidence cannot be obtained at any one time, and if the evidence proved the facts as stated by the court in his qualification, it was of sufficient cogency that the two brothers were acting together at the time of the commission of the homicide to admit the testimony. It may be said in addition to this that there was ample evidence in the record showing the ill-will existing between defendant and deceased, in fact towards the whole of the Stovall family, and this remark of Beach Cameron, that the cause of it would not leak out from them, would add no additional strength to the State's case, and even if it should be held that the evidence was insufficient to show that Beach Cameron and appellant were acting together, it would not present reversible error. Tinsley v. State, 52 Texas Crim. Rep., 91.

Appellant did not testify in the case, but relied on the testimony of his wife to reduce the offense to manslaughter. His wife, who was a sister of deceased, testified that on the morning of the killing deceased had come to defendant's home and raped her, and that a short time prior thereto, on July 13th, deceased had also come to their home and raped her; that she had informed defendant of these facts on the morning of the homicide and just a short time before the killing.

The State's contention in this case was that this was a manufactured defense, and defendant's wife had not been raped by her brother and had not, in fact, told him any such prior to the killing, and on this theory the State was permitted to show the whereabouts of Sutton Stovall on July 13th, and if the State's testimony was believed, it rendered it impossible for him to have been at the home

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of appellant and raped his wife on that day. The State was also permitted to introduce witnesses to show the whereabouts of deceased on the morning of the homicide, and if the jury believed their testimony it rendered it impossible for Sutton Stovall, deceased, to have raped her on that morning. The State was also permitted to introduce testimony that although the wife of appellant was the sister of deceased, and the daughter of Mr. and Mrs. Walter Stovall, none of the family had been permitted to see her since the date of the homicide until the time of the trial, and at the time of the trial defendant and his family kept defendant's wife in close custody, and deceased's family was not permitted to see and talk with her, until under the direction of the court it was permitted. After admitting all this testimony, the court instructed the jury:

"I further charge you that you cannot consider the evidence of the witnesses Walter Stovall, Mrs. Walter Stovall, Will Slatton, Mrs. Will Slatton, George Stovall, Fae Stovall and others, concerning the whereabouts of Sutton Stovall on the 13th and 28th days of July, 1911, for any purpose whatever against the defendant, but only in passing upon the credibility of the witness Mrs. Bert Cameron, and for no other purpose.

"I further charge you that you cannot consider the evidence of Mrs. Walter Stovall or any other witness concerning any alleged undue influence over the said Mrs. Bert Cameron, if there was any, for any purpose whatever against the defendant, but only in passing upon the credibility of the witness, Mrs. Bert Cameron, and for no other purpose."

The contention of appellant is that as his wife had testified that her brother, deceased, had raped her and she had so informed appellant, that the hands of the State were tied, and they could not in any manner attack this testimony. To state this proposition demonstrates its unsoundness. Of course it would be immaterial whether or not deceased had in fact raped his sister, if she had in fact told her husband that he had done so, for he would have the right to act in the one instance as well as in the other. But it was permissible for the State to introduce evidence tending to show that this testimony was not probably true, that in fact deceased had not raped the witness, and the witness had not so told defendant prior to the homicide. The court further instructed the jury: "In connection with the above, I charge you, that if you believe from the evidence that on the morning preceding the homicide the defendant's wife told him that the deceased had assaulted her, and the defendant believed and acted upon such information by killing the deceased upon the first meeting, then such information whether true or false, would constitute adequate cause, and it would be immaterial whether the said deceased had in fact assaulted her or not, and if defendant was so informed by his wife, then he could not be convicted of any higher grade of offense than manslaughter."

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The testimony above recited is reserved in a number of bills, but we have grouped them as there was but one question involved, and that was, could the State attack the credit of the witness who had testified to the rape, and that she had so told defendant. If the State could do so, then the testimony was legitimate and properly admitted in evidence, and if not, then it all should have been excluded. Appellant cites us to a number of authorities to show that a witness cannot be impeached upon an immaterial matter. This is the law, but the testimony of Mrs. Cameron was not about an immaterial matter—it was upon her testimony, that deceased had raped her and she had so informed defendant, defendant relied on it to reduce the offense to manslaughter, consequently her testimony was as to a material issue in the case, and the State was authorized to introduce any legitimate fact or circumstance tending to show that deceased had not raped her, and she had not so told her husband prior to the homicide.

The matter complained of in ground No. 6, that the court erred in permitting certain questions to be asked the wife of deceased on cross-examination, cannot be reviewed as there was no bill of exceptions reserved thereto, and it is not verified in any way.

The court's charge in defining murder in the first degree and express malice did so in language frequently approved by this court. (Branch's Crim. Law, secs. 420 and 421.) The first criticism is that "The charge was upon the weight of the evidence, because the court in effect told the jury if they found certain facts or circumstances from the evidence to exist, it would be express malice." This court expressly held contrary to this contention in Alexander v. State, 40 Texas Crim. Rep., 395. The other criticisms of the charge on murder in the first degree are equally without merit. As hereinbefore stated, the charge is drawn in language that has always received the approval of this court.

The remainder of the motion for new trial relates to the charge on manslaughter, and we here give it in full:

"Manslaughter is voluntary homicide committed under the immediate influence of sudden passion, arising from an adequate cause, but neither justified nor excused by law.

"By the expression 'Under the immediate influence of sudden passion' is meant, that the provocation must arise at the time of the commission of the offense, and that the passion is not the result of a former provocation. The act must be directly caused by the passion arising out of the provocation. It is not enough that the mind is merely agitated by passion arising from some other provocation, or by a provocation given by some person other than the party killed. The passion intended is either of the emotions of the mind, known as anger, rage, sudden resentment, or terror, rendering it incapable of cool reflection.

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"By the expression 'adequate cause' is meant such as would commonly produce a degree of anger, rage, resentment or terror, in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. The following are deemed adequate causes, such as will reduce an unlawful killing to the grade of manslaughter, viz.; (1) Adultery of the person killed with the wife of the person guilty of the homicide; provided, the killing occur as soon as the fact of an illicit connection is discovered. (2) Any insulting words or conduct of the person killed towards a female relation of the party guilty of the homicide, when the killing takes place immediately upon the happening of the insulting conduct, or the uttering of the insulting words, or at the first meeting between the party killing and the party killed, after learning of or being informed of such insults. (3) Any condition or circumstance which is capable of creating and which does create passion, such as anger, rage, sudden resentment or terror, rendering the mind for the time, incapable of cool reflection, whether accompanied by bodily pain or not. The above are deemed adequate causes, and whether such adequate cause existed for such passion, if there was any, it is for you to determine and in determining this question, as well as all other matters before you, you will consider all the facts and circumstances in evidence in the case. And where there are several causes to arouse passion, although no one of them alone might constitute adequate cause, it is for you to determine from all the facts and circumstances in the case, whether or not all such circumstances combined, might be sufficient to do so.

"In order to reduce a voluntary homicide to the grade of manslaughter, it is necessary not only that adequate cause existed to produce the state of mind referred to herein, but also that such state of mind did actually exist at the time of the commission of the offense.

"In connection with the above, I charge you, that if you believe from the evidence that on the morning preceding the homicide the defendant's wife told him that the deceased had assaulted her, and the defendant believed and acted upon such information by killing the deceased upon the first meeting, then such information, whether true or false, would constitute adequate cause, and it would be immaterial whether the said deceased had in fact assaulted her or not, and if defendant was so informed by his wife, then he could not be convicted of any higher grade of offense than manslaughter.

"Now if you believe from the evidence beyond a reasonable doubt that Bert Cameron, with a shotgun, and that the same was a deadly weapon, in a sudden passion arising from an adequate cause, as the same has heretofore been explained, with intent to kill, did, in the County of Eastland and State of Texas, on or about the 28th day of July, A. D. 1911, unlawfully shoot and thereby kill the said Sutton Stovall, if in fact he did do so, then you would find the defendant guilty of manslaughter and assess his punishment at confinement in

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the State penitentiary for any term of years, not less than two nor more than five, as in your discretion you may determine and so state in your verdict."

Appellant in his motion selects various excerpts from this charge and criticises same, but it is incumbent upon us to take the charge as a whole, and if when so read it fairly presents the issue in accordance with the evidence adduced on the trial, no error is presented. Fay Stovall testified that she and her brother (deceased) and her sister Cordie started from their father's home to Nimrod to preaching. That before they had gone but a short ways she saw defendant approaching on horseback. That when he met them he told (to use her own language), "Sutton to 'get out of there.' He then fired the gun. He fired the gun at Sutton and missed him. Bert Cameron fired the gun. At the time he fired the gun, Sutton was sitting between me and Cordie. When Bert fired the gun, Sutton says 'Don't shoot; don't Bert.' Me and my sister screamed 'don't Bert.' Bert Cameron was nearly past the horse (to the buggy) before I noticed the gun. He was nearly past our horse before I noticed the gun. He was holding the gun up. It was a double-barrel shotgun. After Bert fired the first shot, Sutton slapped the horse with the lines and started him faster. The horse that we were driving went south. Bert then overtaken us. I don't remember whether I looked back before he overtook us and before the second shot or not. The next thing that happened, that I know of, he blowed his brains out. I was sitting on the left hand side of the buggy and Bert came up on the left hand side. My sister was sitting on the right hand side of the buggy, going south. At the second shot, Bert just rode up by the side of the buggy and pointed the gun in and shot his brains out. When he shot Sutton, Sutton fell over in Cordie's lap. He didn't say anything. He didn't speak. I reckon he just died right then. He never did speak. Bert did not say anything after he shot, nor after the second shot. I never heard him if he did. Right after the second shot was fired, I saw Beach Cameron there. He was nearly to the horse when I saw him. He came running up the road with his hands in his jumper pockets and he caught the horse and turned it around for us. After our horse was turned around, I looked back and both Beach and Bert were on the horse. I heard Beach say, 'Go home.'" There was evidence in the record showing previous ill-will, a fight, etc. The court also instructed the jury if they had a reasonable doubt as to whether defendant was guilty of murder or of manslaughter, to give defendant the benefit of the doubt and find him guilty of no higher grade of offense than manslaughter.

There is no evidence tending to show that appellant acted in self-defense. The only defense was the attempt to reduce the homicide to manslaughter, based on the testimony of his wife hereinbefore recited, and when we read the charge on manslaughter as a whole we think it fairly and fully presents that issue to the jury for their

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determination, and the criticisms of this charge present no such question as should call for a reversal of the case.

If the jury had believed the testimony of appellant's wife, under the charge they could have found him guilty of no higher grade of offense than manslaughter, but evidently they believed the State had successfully attacked this testimony, and shown it to be an after consideration.

The judgment is affirmed. *Affirmed.*

[Rehearing denied, February 26, 1913.—Reporter.]

JOHN JONES V. STATE.

No. 1973. Decided January 22, 1913.

Rehearing denied February 26, 1913.

1.—Theft from Person—Sufficiency of the Evidence.

Where, upon trial of theft from the person, the evidence sustained the conviction, there was no error.

2.—Same—Continuance—Want of Diligence—Testimony Probably Not True.

Where, upon trial of theft from the person, the application for continuance showed a want of diligence and that the alleged absent testimony was probably not true, there was no error in overruling the motion. Following Giles v. State, 66 Texas Crim. Rep., 638.

3.—Same—Jury and Jury Law—Separation of Jury—Rule Stated.

The statute does not require the court to keep together jurors who have been accepted in a felony case less than capital when they have not been sworn to try the case; and to successfully challenge any or all of them, in case they have separated before being sworn, the defendant must affirmatively show that the jurors have been tampered with while thus separated, and because thereof they are not fair and impartial jurors, and that by such tampering, defendant has not had a fair and impartial trial. Overruling Wilcek v. State, 141 S. W. Rep., 88. Davidson, Presiding Judge, dissenting.

4.—Same—Statutes Construed—Fair Trial.

See opinion for construction and review of Articles 698, 699, 745, 746, 10, 22, 687, 690, 837, Code Criminal Procedure, with reference to separation of jurors and securing a fair and impartial trial.

5.—Same—Case Stated—Challenge.

Where, upon trial of theft from the person, nine jurors had been accepted by both sides but had not been sworn as jurors, and were then permitted to separate during the noon recess of the court, and it was shown that they had not had any communication with anyone about the case or that they were not fair, competent and impartial jurors, there was no error in overruling defendant's motion to set aside the jurors. Davidson, Presiding Judge, dissenting.

6.—Same—General Objections—Practice on Appeal.

Where, appellant's complaint concerning the charge of the court are entirely too general, they cannot be considered on appeal. Following Berg v. State, 64 Texas Crim. Rep., 612, and other cases.

Appeal from the Criminal District Court of Dallas. Tried below before the Hon. Robt. B. Seay.

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Appeal from a conviction of theft from the person; penalty, five years imprisonment in the penitentiary.

The opinion states the case.

Ellis P. House, for appellant.—On question of continuance: Gilder v. State, 61 Texas Crim. Rep., 16, 133 S. W. Rep., 883; Presley v. State, 60 Texas Crim. Rep., 102, 131 S. W. Rep., 332; Cameron v. State, 57 Texas Crim. Rep., 316, 122 S. W. Rep., 870.

On question of separation of jurors: Myers v. State, 65 Texas Crim. Rep., 448, 144 S. W. Rep., 1134; Wilcek v. State, 141 S. W. Rep., 88, and cases cited in minority opinion.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—Appellant was convicted for privately stealing from the person and his punishment fixed at five years in the penitentiary.

The evidence of the State is clear and ample, showing the guilt of appellant.

The court did not err in overruling appellant's motion for a continuance and later for a postponement of the case. The motion and bill of appellant on the subject, as explained by the court, show such a lack of diligence on appellant's part as not to entitle him to a continuance. The qualification of the Judge to the bill is as follows: "Explanation—I do not think sufficient diligence was shown, nor did I believe that the testimony of the absent witnesses were material, or if so, probably true—see where the defendant in the statement of facts contradicts the allegation of this motion by stating that immediately after the loss of the money, the prosecutor and his wife charged the defendant with stealing it. I do not know when I made the order, setting the case for trial, but I do know that I examined the docket, and the envelope containing the papers of the case and found no attorney for them, although I have frequently requested counsel to record their names so that the court could notify them. Further, I sent the clerk of the court to jail to find out who was defendant's attorney, and to obtain the names of the witnesses. The record shows (and the clerk informs me) that the defendant did not tell him who his attorney was, but gave his witnesses' names as follows: Quincy McKinney, works in T. & P. yards in Ft. Worth, Texas; negro porter, runs on morning train eastbound on T. & P. R. R. out of Ft. Worth. The clerk issued the subpoena and mailed it to Ft. Worth and the Tarrant County sheriff returns the same received February 17, 1912, and after diligent search and inquiry, not found in Tarrant County, Texas. Although Mr. House, attorney, went to Waxahachie without obtaining process, and I did not know that he was attorney until the 19th of February. I did postpone the case until his return on February 20th, when the case was tried. This application was presented by defendant as stated in the bill, and was overruled. To this extent,

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I approve the bill." Giles v. State, 66 Texas Crim. Rep., 638, 148 S. W. Rep., 317.

By two other bills appellant complains that the court erred and that the case should be reversed, because the court refused to sustain his challenge to nine of the jurors, under this state of facts: After the jury panel had been examined by both sides, touching their qualifications as jurors to try the case and both sides having struck their lists and handed them to the clerk, who noted down the names of the accepted jurors, nine in number, which nine jurors had been accepted by both sides as jurors to try the case but had not been sworn as jurors, the court permitted them to separate and go to their respective places of business or where they desired from 11:15 o'clock a. m. until 2:00 o'clock p. m. unaccompanied by an officer, and when court convened at 2:00 o'clock p. m. and all of said nine jurors had returned to sit as jurors in the case, the defendant in open court, made a motion to quash the jury panel on the grounds that the court had allowed the jury to separate. The bills nowhere and in no way attempt to show that the nine accepted jurors, who had not been sworn and empaneled, had talked to anyone about the case, or that anyone had talked to them about the case, and nowhere and in no way attempts to show that they were in any way not fair and impartial and competent to try the said case. The sole ground claimed is that because they were permitted to separate and go where they pleased, during the noon hour. The Judge, in approving the bill, stated: "I can not find when it has ever been held in Texas that jurors are to be held in custody by the sheriff until they are empaneled and sworn. In capital cases, of course, they are sworn and empaneled as each is accepted. I instructed the jury not to speak to anyone about the case or allow any one to speak to them during the recess. I want the upper court to direct whether a jury must be confined over night or recess before the jury is completed or before any of them are sworn to try the case."

We have sought diligently to find any case decided by this court or any statute requiring the accepted jurors in such case, as shown, to be kept together in charge of an officer or that because they are not so kept together in charge of an officer that it would result fatally to a conviction and require this court to reverse, and have failed to find any, except the case of Wilcek v. State, 141 S. W. Rep., 88 and appellant's attorneys have cited us to no other case except the Wilcek case. The only statutes we have found, as we think, which bear upon the question, are the following:

"Article 698, Code Criminal Procedure: As each juror is selected for the trial of the case, the following oath shall be administered to him by the court, or under its direction: 'You solemnly swear that in the case of the State of Texas against A. B., the defendant, you will a true verdict render, according to the law and the evidence, so help you God.' "

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"Article 699. The court may adjourn persons summoned as jurors in a capital case to any day of the term; but when jurors have been sworn in a case, those who have been so sworn shall be kept together and not permitted to separate until a verdict has been rendered, or the jury finally discharged, unless by permission of the court, with the consent of the State and the defendant, and in charge of an officer."

These articles refer to the organization and empaneling of a juror in a capital case. Another article with reference to the jury separating before verdict, after even being empaneled and sworn and on the trial of the case is Article 746, Code Criminal Procedure: "In case of misdemeanor, the court may, at its discretion, permit the jury to separate before the verdict, after giving them proper instructions in regard to their conduct as jurors in the case while so separated."

With reference to the jury on such subject in felony cases, other than capital, the statute is, Article 745, Code Criminal Procedure: "*After* the jury has been *sworn and impaneled* to try any case of felony, they shall not be permitted to separate until they have returned a verdict, unless by permission of the court, with the consent of the attorney representing the State and the defendant, and in charge of an officer."

It is true that our Constitution and Code provides, Article 10, Code Criminal Procedure and Bill of Rights: "The right of trial by jury shall remain inviolate," and Article 22, Code Criminal Procedure provides: "The defendant in a criminal prosecution for any offense may waive any right secured to him by law, except the right of trial by jury in a felony case." The Code of Procedure expressly provides, in the organization of juries in criminal cases, who are incapable or unfit to serve as jurors. Criminal Code of Procedure, Article 692; and also prescribes the questions that are to be asked the jurors when empaneling a jury, the mode of testing their qualifications and the questions to be asked them. Criminal Code of Procedure, Article 687. It also prescribes Article 680: "The defendant may challenge the array for the following causes *only:* That the officer summoning the jury has acted corruptly and has wilfully summoned persons upon the jury known to be prejudiced against the defendant with a view to cause him to be convicted." But in the next article, expressly provides that when the jurors summoned are those who have been selected by jury commissioners, even such challenge of the array can not be made.

Then Article 837 provides that "new trials, in cases of felony, shall be granted for the following causes and for no other": After giving certain causes which have no application to this question, in sub-division 8, which is the only one applicable to this question, says: "Where, from the misconduct of the jury, the court is of opinion that the defendant has not received a fair and impartial trial * * *"

It is perfectly apparent and clear to us that all the provisions of

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our law on the subject of jurors to try felony cases were enacted so that a fair and impartial jury may be had. In this case no attempt was made to show that either of the said nine jurors were not fair and impartial. If such had been the case appellant could have made his attack when he first challenged the array of these nine jurors at 2 o'clock p. m. on the day of the trial, or if not then, certainly by a motion for a new trial during the term of the court. But no such attack or claim was made, even by implication, other than the mere fact that the court did not keep the nine accepted jurors together in charge of an officer at the noon recess. No attempt was otherwise made in this case to show, either directly or indirectly, that appellant was in any way injured by these nine persons having been permitted to separate during the noon recess.

Construing all of these articles together we think it is clear and beyond dispute that the law does not require or contemplate that jurors, in such instances, shall be kept together in charge of an officer. Article 699, supra, expressly provides that the court may adjourn persons summoned as jurors in capital cases to any other day of the term, but says, *when jurors have been sworn* in cases and *those who have been so sworn,* shall be kept together and not permitted to separate until a verdict has been rendered or the jury discharged, unless by permission of the court with the consent of both parties, in charge of an officer, thereby specifying what jurors shall be kept together, in charge of an officer and what shall not be so kept together, and limits those who are to be kept together to *those who have been sworn* in the case. Again, Article 745, supra, expressly emphasizes this, in that it says, *after the jury has been sworn and empaneled* they shall not be permitted to separate, thereby again emphasizing the fact that if it is only the sworn and empaneled juror who is prevented from separating. Clearly and unquestionably if the law had intended that jurors were to be kept together before they were sworn and empaneled, the statute would have said so in clear and unmistakable language. Under the circumstances stating when they should be kept together and not permitted to separate in all cases, as is shown above, excludes the idea that they are to be kept together under any other circumstances and under the circumstances as shown in this case.

We are not without cases decided by this court and the Supreme Court, when it had criminal jurisdiction, of when and how a verdict is invalid where, even the jurors separated *after* being empaneled and sworn and *after* hearing a part or all of the testimony in the case, and even when considering their verdict, after hearing all the evidence, argument and charge of the court.

The correct rule is laid down in the case of Jack v. State, 26 Texas, 1, which was a capital case and affirmed. The Supreme Court said: "It must be shown that the misconduct or separation has affected the fairness or impartiality of the trial." To the same effect is Wake-

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field v. State, 41 Texas, 556; also Johnson v. State, 27 Texas, 758. In Robinson v. State, 58 Texas Crim. Rep., 550, which was a death penalty case affirmed, this court, through Judge McCord, said: "The mere separation of a jury, pending verdict, is not cause for a new trial; in addition to the separation in contravention of law, it must further be made to appear that by reason of such separation, probable injustice to the accused has been occasioned." In Ogle v. State, 16 Texas Crim. App., 368, Judge Willson, for this court said: "The mere separation of a jury, pending verdict, is not cause for a new trial; in addition to the separation in contravention of law, it must further be made to appear that by reason of such separation, probable injustice to the accused has been occasioned," citing the statute and Davis v. State, 3 Texas Crim. App., 91; Cox v. State, 7 Texas Crim. App., 1; West v. State, 7 Texas Crim. App., 150; Russell v. State, 11 Texas Crim. App., 288.

In Stewart v. State, 31 Texas Crim. Rep., 153, this court, through Judge Simpkins, said: "It appears that during the deliberation of the jury, and while in the custody of two bailiffs, one of the jurors, E. P. Bass, was allowed to leave the jury room, and, unattended, convey up some bedclothes to the floor above, to the person from whom they were borrowed, then walk across the hall, while upstairs, to a friend's room, and get a drink of whisky, and, upon being asked, stated the jury had not agreed upon a verdict. This, however improper and suspicious, would not of itself warrant a reversal; it not being shown that probable injustice was done."

In Boyett v. State, 26 Texas Crim. App., 689, which was a murder case in which the appellant was convicted for a life sentence, and affirmed, Judge Hurt, for the court, after stating that where a separation of the jury was permitted by the court, over the then objection of the appellant, it would present reversible error, but said: "But in cases like the one in hand, and where the jury separate without permission of the court, to reverse, it must appear that the juror conversed with others about the case, or was guilty of misconduct to the prejudice of the accused," citing Jones v. State, 13 Texas, 168; Jack v. State, supra; Wakefield v. State, supra; March v. State, 44 Texas, 64; Defriend v. State, 22 Texas Crim. App., 570.

Judge White in sec. 865, p. 559, of his Ann. C. C. P. says: "To reverse because the jury separated without consent of the court, it must appear that the separating juror conversed with other persons about the case, or committed other misconduct to the prejudice of the accused," citing Boyett v. State, supra, and Taylor v. State, supra. See other cases in this section cited by Judge White.

So that on this question, we hold:

First, the statute in no way requires the court to keep together accepted jurors in a felony case less than capital, when they have not been sworn to try the case; second, that where jurors in such case have been accepted and not sworn in order to successfully challenge

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any or all of them the appellant must affirmatively show that they have been tampered with while separated, and because thereof they are not fair and impartial jurors and that by such tampering with them he has not had a fair and impartial trial.

We inadvertently held in the case of Wilcek v. State, 141 S. W. Rep., 88, cited above, that such a separation of unsworn jurors was "clearly a violation of the statute." In so holding we were in error and that case on this point is hereby expressly overruled.

Appellant's complaint that the court erred in refusing to give his special charge No. 1, and his bill of exception to that effect, are entirely too general to require this court to consider it. Bird v. State, recently decided; Berg v. State, 64 Texas Crim. Rep., 612, 142 S. W. Rep., 884; Ryan v. State, 64 Tex. Crim. Rep., 628, 142 S. W. Rep., 878. Besides, as stated by the court there was no evidence calling for any such charge.

No error having been pointed out, the judgment will be affirmed.

Affirmed.

[Rehearing denied February 26, 1913.—Reporter.]

DAVIDSON, PRESIDING JUDGE (dissenting).—There are several questions in the case that perhaps ought to require a reversal of the judgment. It occurs to me defendant has not had the fair and impartial trial that the law justifies him in asking and demanding of the State to award him. I desire, however, to enter some reasons for dissenting on one of the propositions.

A bill of exceptions shows that after the jury had been examined on their voir dire by both sides touching their qualifications as jurors, and nine of the number had been accepted by both sides as jurors in the case, but had not been sworn to try the case, the court permitted them to separate and go to their respective places of business or where they desired. This occurred at 11:15 o'clock in the morning and they remained separated until 2 o'clock p. m. unaccompanied by an officer, and when court convened at 2 o'clock p. m. and all of said nine jurors had returned to their place in the courtroom, defendant in open court made a motion to quash the jury panel on the ground that the court had allowed them to separate, which they did, going where they choosed unaccompanied by an officer, and further because they had scattered and separated and had not been kept together in charge of an officer. All these matters were overruled and defendant excepted to the ruling of the court for the reasons stated. The court qualified this bill by stating that he "could not find where it had ever been held in Texas that jurors are to be held in custody by the sheriff until they are empaneled and sworn. In capital cases, of course, they are sworn and impaneled as each is accepted. I instructed the jury not to speak to anyone about the case or allow anyone to appeal to them during the recess. I want the upper court to direct whether a jury must be confined over

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night or at recess before the jury is completed or before any of them are sworn to try the case." This qualification is signed by the district judge who tried the case.

Another bill presents the matter in this form: After the court had permitted nine of the jurors selected by the State and defendant, as jurors to try the cause, to separate and go where they desired unaccompanied by an officer from 11:15 a. m. until 2 p. m. and after the court had in all things overruled the defendant's motion to quash the jury panel, and defendant's challenge of said nine jurors for cause, the defendant then in open court made his challenge for cause to each of the said nine jurors and challenged them separately for cause on the grounds that they had been permitted to separate from 11:15 a. m. until 2 p. m. and go in different directions unaccompanied by an officer, which motion to challenge each of said nine jurors separately the court overruled and compelled the defendant to accept said nine jurors as jurors to try the cause. This bill is signed without qualification.

Another bill recites that after counsel for both parties had struck their lists and accepted the nine jurors specified to try the case, the court permitted them to separate and go to their respective places of business or wherever they saw proper to go from 11:15 o'clock a. m. until 2 o'clock p. m. unaccompanied by an officer, and after the court, when it reconvened at 2 o'clock p. m., had overruled defendant's motion to quash the jury panel, the defendant then challenged all of the jurors for cause for the reason that said nine jurors had been permitted to go in different directions and where they choosed from 11:15 a. m. until 2 p. m. unaccompanied by an officer. This was overruled and the bill signed.

This whole matter is presented in these three different forms by appropriate bills of exception. This question was decided by this court adversely to the decision of the trial court in Wilcek v. State, 141 S. W. Rep., 88. In the opinion written by Judge Prendergast the Wilcek opinion is overruled, and it is stated that that opinion was "inadvertently" written. The writer of this dissent wrote the opinion in the Wilcek case, and the opinion was written after careful thought and not through inadvertence so far as the writer is concerned. Reviewing the question again in the light of the opinion of my brethren and of the authorities, I am still of the opinion that the opinion in the Wilsek case is correct. It has been laid down in the authorities in Texas and elsewhere, that the separation of the jury, especially under the mandatory provision of the statute, is reversible error, and where the jury has been sworn it is provided so by statute expressly. It has further been held that with reference to the procurement of jurors generally, if the statutory provisions as to the formation of the jury are of a mandatory character, noncompliance therewith will invalidate the proceedings. This is the rule wherever the statutes so enact. For collation of authorities, see

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note 1, page 525, Vol. 12 Ency. of Pleading and Practice. It is also the rule where by statute the jurors in the trial of an indictment for a felony are expressly forbidden to separate, unless by permission of the court and the consent of the defendant, and then only in the custody of an officer, the court cannot permit a separation over the objection of the defendant irrespective of the question of prejudice or injury. Defriend v. State, 22 Texas Crim. App., 570; Robinson v. State, 30 Texas Crim. App., 459; Grissom v. State, 4 Texas Crim. App., 374; Cox v. State, 7 Texas Crim. App., 1; Early v. State, 1 Texas Crim. App., 248; Wright v. State, 17 Texas Crim. App., 152; Walker v. State, 37 Tex. 366. Our statute forbidding the separation of jurors in felony cases, unless under conditions therein prescribed, is mandatory, and where jurors have become separated from an officer who has taken them from the main body, there must be a new trial. Warren v. State, 9 Texas Crim. App., 619. Disregard of a mandatory provision that the jurors shall not be permitted to separate without the consent of the defendant will require a reversal of a conviction. State v. Place, 5 Wash., 773; State v. Smith, 102 Iowa, 656; State v. Garrity, 98 Iowa, 101. In Texas the jury cannot be permitted to separate except by the consent of the accused. Some of the cases cited have been after the jury had been impaneled and sworn, but in the Wilcek case, supra, the precise question raised in this case was there decided as being of a mandatory nature and, therefore, reversible, and the judgment was reversed for that reason. In the case of Hines v. State, 27 Tenn., 597, this view was sustained in an opinion by Judge Nathan Green, he delivering the opinion for the court. He uses some language that is well worthy of consideration. In that case the jury had separated before being sworn and impaneled as in this case. Without repeating the facts, which are shown in the opinion itself, he says:

"It is of the utmost importance to the administration of justice, that the purity of the trial by jury should be preserved. And so jealous were our ancestors upon the subject, that a separation of a juror from his fellows, was regarded per se, as sufficient to vitiate the verdict. It was not deemed competent for the prosecution to explain the conduct of the juror, and to show that he had not been tampered with. But this extreme strictness, has been relaxed in England, and most of the states of the Union; and as is justly remarked in Stone vs. The State, (4 Humph. R., 27,) by the judge who delivered the opinion; 'the purity of jury trials is now made to depend, not on form, but substance.' Still, in that case, and in the case of McLain vs. The State, 10 Yerg. R. 241, it is held, that to ensure to the accused, 'the full benefit of the judgment of his peers, it is absolutely necessary that the minds of the jurors, should not have prejudged his case; that no impression should be made except what is drawn from the testimony given in court, to operate on them; and that to secure this, they must not be permitted to separate and

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mingle with the balance of the community, without explanation, showing that they had not been tampered with, and that it is not necessary for the prisoner to prove, that they had been.'

"The principles laid down in these cases are, 1. That the fact of separation having been established by the prisoner, the possibility that the juror has been tampered with, and has received other impressions than those derived from the testimony in court, exists, and prima facie, the verdict is vicious; but 2nd. This separation may be explained by the prosecution, showing that the juror had no communication with other persons, or that such communication was upon subjects foreign to the trial, and that in fact, no impressions, other than those drawn from the testimony, were made upon his mind. 3rd. In the absence of such explanation, the mere fact of separation is sufficient ground for a new trial. Taking these principles as the settled law of this court—the question is, whether the separation of the juror, McNeely, is satisfactorily explained. And we think it is not. The only witness who gives any explanation whatever, is the offending juror."

In this case the separation is shown with the consent of the court but without the consent of the defendant. The defendant insisted upon the reassembling of the jury that the panel be quashed, and, second, he excepted and challenged each of the nine jurors specifically for the reasons he gave at the time set out in bill of exceptions, and third, he challenged all nine of the jurors who had separated. This was not met or attempted to be met with any fact showing they had not talked or conversed with people about the case. As the writer understands the jury trial in its essence means the accused shall have a fair trial by an impartial jury; at least such is the provision of the Bill of Rights as set forth in the Constitution. If any juror has been tampered with it vitiates the verdict under all the authorities, and this without a separation. But the keeping of the jury together is based mainly upon the proposition, that having been segregated they are immune from the possibility of contamination from the outside world, and from this view it would make no difference whether it was after or before they were sworn. Whether he was sworn or not would not prevent the outsider from talking with him or he with the outsider, and it occurs to me the reasons would be stronger why he should not be subject to contamination after being segregated as a juror in the case before being sworn than he would be after he had been sworn, because after having been sworn, after segration, he is then supposed to be in charge of an officer and beyond reach of contamination, but in the other he is turned loose where he may meet everybody coming and going, and these jurors were permitted to go without an officer and without the consent of the defendant and over his protest by means of said challenge, from 11:15 a. m. until 2 p. m., and not a word came from them as to whether or not they had been approached by others on the outside.

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If the separation of the jury means anything, it occurs to me that this case is strongly in point under our statutory law and under our Constitution as it is well to place one. If the rule underlying the doctrine of separation of the jury is to prevent contamination, then this was a grievous violation of the entire doctrine. I think the Wilcek case is correct. Our statutes are mandatory that the separation of the jury shall not occur after it had been once set apart and it is thus signified to the world that these are the jurors in this particular case, and the mere fact that they were or were not sworn would not depreciate the probable injury that might occur, nor the reason why a separation should not occur.

These are some of the reasons I cannot agree with my brethren and therefore respectfully enter my dissent.

JIM BRYANT v. STATE.

No. 2233. Decided February 26, 1913.

1.—Theft—Motion for New Trial.

An objection that the court erred in paragraph one of the charge in defining the offense of theft, and in refusing to give defendant's special charge is too general to be considered on appeal; besides, when considered, there was no error. Following Sue v. State, 52 Texas Crim. Rep., 122, and other cases.

2.—Same—Misconduct of Jury—Motion for New Trial—Affidavit.

When extrinsic matters are set up in a motion for new trial, they must be supported by affidavit. Following Barber v. State, 35 Texas Crim. Rep., 70.

3.—Same—Statement of Facts—Motion for New Trial.

Where the statement of facts of the evidence on motion for new trial was not filed in term time, the same cannot be considered on appeal; besides, there was no error. Following Probest v. State, 60 Texas Crim. Rep., 608.

Appeal from the District Court of Parmer. Tried below before the Hon. D. B. Hill.

Appeal from a conviction of theft; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Knight & Slaton, for appellant.—On question of statement of facts on motion for new trial: Probest v. State, 60 Texas Crim. Rep., 608, 610; Harris v. State, 46 S. W. Rep., 647.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was prosecuted, charged with theft of an automobile and his punishment assessed at two years confinement in the State penitentiary.

The first two grounds in the motion for new trial read as follows: "1. The court erred in paragraph 1 of the charge in defining the offense of theft; (2) The court erred in refusing to give defendant's

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special requested charge No. 1." These grounds are too general to be considered on appeal. (Sue v. The State, 52 Texas Crim. Rep., 122; Stewart v. State, decided at this term of court, and authorities there cited.) If called to our attention in a way we could consider them, however, the charge fully defines the offense, and the charge requested is sufficiently covered by the charge given by the court to the jury.

The only other grounds in the motion relate to the misconduct of the jury. The motion is not sworn to by appellant or any other person, and is deficient in this respect. It has always been held that when matters extrinsic the record, in matters of this character, are sought to be raised in the motion for new trial, such grounds should be verified by the affidavit of the appellant. In addition to this, the evidence heard on these grounds on the motion for new trial, was not filed until the 12th day of June, 1912; is not approved by the Judge trying the case, nor agreed to by the attorneys. Consequently such statement of facts can not be considered. In such cases it has been held that where evidence is heard, on grounds in the motion for new trial, such statement in the motion must be verified by the appellant, and the statement of facts approved by the Judge and filed in term time. (Probest v. The State, 60 Texas Crim. Rep., 608.) Court adjourned April 27, and this paper which purports to be the evidence on the motion for new trial was not filed with the clerk until June 12, 1912.

These are all the grounds in the motion, and the judgment is affirmed. *Affirmed.*

ON MOTION FOR REHEARING.

February 26, 1913.

HARPER, JUDGE.—This case was affirmed at a former day of this term, and appellant has filed a motion for rehearing in which he complains of that portion of the opinion in which it was said: "It has always been held that when matters extrinsic the record are sought to be raised in the motion for new trial, such grounds should be verified by the affidavit of the appellant." Appellant says he has failed to find any decision so holding. If he will read Barber v. State, 35 Texas Crim. Rep., 70, he will find a case so holding, and this has always been the rule. It is only those paragraphs setting up this new matter that are required to be sworn to. But if we should waive this question, and the ones that the evidence alleged to have been adduced on the motion for new trial, but which is not verified by the signature of the judge, and the further fact that this evidence was not filed in proper time, after careful reading of what purports to be the evidence adduced we would not feel authorized to hold that the court erred in this matter.

The motion for rehearing is overruled. *Overruled.*

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SAM SPICER V. STATE.

No. 2317. Decided February 26, 1913.

1.—Burglary—Continuance—Immaterial Testimony.

Where defendant's application for continuance stated no fact that he expected to prove by the absent witnesses which could or would have been a defense to the offense charged, there was no error in overruling the motion for continuance.

2.—Same—Copy of Indictment—Service—Waiver.

While Article 546, Code Criminal Procedure, provides that defendant shall be entitled to two days after service of copy of indictment to prepare for trial, such right can be waived by the defendant, and where he did so, there was no error in forcing him to trial before that time; besides, it is too late to make this contention after verdict. Following Richardson v. State, 7 Texas Crim. App., 486.

3.—Same—Evidence—Declarations by Defendant.

Where, upon trial of burglary, the State introduced in evidence the declarations of the defendant before a justice of the peace as a witness by which he admitted that he sold the alleged stolen property to the party in whose possession it was found, there was no error, it appearing that defendant, at that time, was not under arrest and that no complaint had been filed against him for the offense for which he was being tried.

Appeal from the District Court of Taylor. Tried below before the Hon. Thomas L. Blanton.

Appeal from a conviction of burglary; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Louis S. Wise, for appellant.—On question of defendant's confessions and declarations: Gilder v. State, 33 S. W. Rep., 867; Twiggs v. State, 75 S. W. Rep., 531; Bain v. State, 74 S. W. Rep., 542; Crowder v. State, 11 S. W. Rep., 835; Walker v. State, 12 S. W. Rep., 503; Kirby v. State, 5 S. W. Rep., 165; People v. McMahan, 15 N. Y., 384; Com. v. Knapp, 9 Pick., 495; Fry v. State, 58 Texas Crim. Rep., 169; 124 S. W. Rep., 920.

C. E. Lane, Assistant Attorney-General, for the State.—On question of admitting defendant's voluntary statements: Dill v. State, 35 Texas Crim. Rep., 240.

HARPER, JUDGE.—In this case an indictment was returned against appellant by the grand jury of Taylor county, charging him with burglary on the morning of the 31st day of August. He was arrested on that day, and served with a copy of the indictment. It appears from the record that he was carried into open court on that afternoon, and an attorney appointed to represent him. The record discloses that on Saturday evening at this time, as appellant was in jail, the case was set for trial on the following Monday, the court stating that appellant waived the two days he is allowed by law to

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prepare for trial. When the case was called for trial on Monday, the attorney who had been appointed by the court, filed the following motion: "The defense in the case of The State of Texas v. Sam Spicer, hereby files this his motion for a continuance, for the following reasons, towit: (1) That the defendant was arrainged Saturday afternoon and furnished with a copy of the indictment and counsel appointed to defend him, and that on Monday morning, the case was called for trial and the defense has failed to collect proper evidence owing to the lack of time. That the defense believes and has reason to believe that if proper time is given, he will be able to secure witnesses and for this the defense asks that the case be continued." The court overruled this motion, one of the grounds for so doing being that appellant had waived the two days allowed by law, and the case set for trial on this day at his request. Appellant then moved to continue the case on account of the absence of Mr. Adams and Cleve Spicer, stating that he expected to prove by the witnesses. If the facts stated that he expected to prove by these two witnesses would have been any defense to the accusation against him, we would be inclined to hold that the court should have postponed the case until the presence of these witnesses could have been obtained, but if the witnesses had sworn to the facts stated in the application, it would have been no defense, as we read the record. It appears [illegible] record that the barn of appellant's father, R. Spicer, wa[illegible] open at night, and some sacks of oats stolen. The next mor[illegible] Spicer missed the oats and traced some wagon tracks to the [illegible]f George Combs; there he found four sacks of oats which he says he recognized as the oats stolen from his barn by the way the sacks were sewn; the wagon standing by the barn had loose oats in the bed. George Combs testified he bought these oats from appellant. Appellant at an examining trial admitted he sold these oats to Combs, and had hauled them to Combs' place in this wagon. Appellant's father testified that appellant did not live with him, and had no right to go into his barn and take his oats. In the application for a continuance it is stated it is expected to be proven by Mr. Adams that he had also missed some oats, and oats were stolen from him on the night that Mr. Spicer lost his oats. As the application does not state that Mr. Adams could or would identify the oats found in Combs' barn as his oats, and the record discloses that Mr. Spicer does positively identify the oats found as his oats, the facts that Adams would testify he had oats stolen from him would present no defense to this accusation. It is nowhere stated that it was expected to be proven that the oats were in fact Adams' oats. By the witness Cleve Spicer it is stated it is expected to be proven that "Mr. R. Spicer had never told defendant that he did not have permission to come on his premises." As Cleve Spicer did not live with R. Spicer, it is incomprehensible to us as to how he could testify that R. Spicer "had never told appellant he did not have permission to come on the

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premises." But suppose he had never told appellant not to come on the premises, as appellant was not living with R. Spicer, nor working for him, this would not authorize him to go on the premises in the night time, break into his barn and steal oats, if he did do so. Consequently no fact stated that he expected to prove by these witnesses could or would have been any defense to the burglary of the barn, and we can not say that the court erred in the matter.

While in the brief in this court it is urged that appellant had not been served with a copy of the indictment for two days when tried, and we are asked to reverse the case for that reason, yet in the motion for a continuance, filed in the trial court, this ground is not urged. We suppose the reason why it was not urged at that time was because of the waiver of appellant, and the request that the court says he made to have the case set for trial on Monday. In Richardson's Case, 7 Texas Crim. App., 486, it is held that after verdict, it is too late to make this contention, and Article 546 of the Code of Criminal Procedure provides that he shall be entitled to two days after service of copy of indictment, unless the right to such copy *or to such delay be waived.* In this case as the record discloses that the time was waived, no error is presented.

In another bill it is made to appear that when R. Spicer found the oats he claimed in George Combs' barn, he at once reported it to the justice of the peace, and sued out a search warrant, and a warrant was issued for George Combs. Mr. Whaley, a deputy sheriff, arrested George Combs and while on the way to the justice's office he told Mr. Whaley he had purchased the oats from appellant. On the way to the justice's office they met appellant, and when he was asked if he sold Combs any oats he first said, "no," and then laughingly remarked he might have done so. The deputy sheriff then asked appellant to go to the justice's office with them. No complaint was ever filed against appellant, but a hearing was had and George Combs was bound over to await the action of the grand jury. At this hearing appellant testified, and testified that he had sold George Combs four sacks of oats, but declined to say where he had obtained the oats, saying that before delivering the oats to Combs he had them hid on the creek north of town. That he got a horse out of a pasture, hitched it to the wagon, and carried the oats to Combs, and Combs had paid him for them. The grand jury, however, when considering the case indicted appellant and did not indict Combs. Appellant objected to his statements made at the hearing in justice court being introduced in evidence against him. As the record discloses that no complaint was ever filed in the justice court against him, that he was never arrested charged with this offense until after indictment was found, Deputy Sheriff Whaley testifying that appellant was not placed under arrest, and nothing was said that could or would lead him to believe that he was under arrest, and in fact no complaint on this charge was made against appellant until after the grand jury

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returned the bill of indictment and he was not arrested until after indictment found, consequently the statements made by appellant were admissible in evidence.

The judgment is affirmed.

Affirmed.

MARCH, 1913.

WILL GARRETT V. STATE.

No. 2315. Decided March 5, 1913.

Rehearing denied April 2, 1913.

1.—Murder—Sufficiency of the Evidence.

Where, upon trial of murder and a conviction of murder in the second degree, the evidence sustained the conviction, there was no error.

2.—Same—Charge of Court—Defensive Theories.

Where, upon trial of murder, the court submitted to the jury all of defendant's theories of defense, the reasonable doubt, etc., there was no error.

3.—Same—Charge of Court—Manslaughter—General Objections.

Where, upon appeal from a conviction of murder in the second degree, the appellant complained in a general way that the court should have charged on manslaughter, the same could not be considered. Besides, the evidence did not raise the issue of manslaughter. Following Mansfield v. State, 62 Texas Crim. Rep., 631, and other cases. Davidson, presiding judge, dissenting.

4.—Same—Verdict—Words and Phrases.

Where the appellant complained that the word, "at," between the words, "punishment" and "twenty," was omitted, the verdict was, nevertheless, sufficient.

Appeal from the Criminal District Court of Dallas No. 2. Tried below before the Hon. Barry Miller.

Appeal from a conviction of murder in the second degree; penalty, twenty years imprisonment in the penitentiary.

The opinion states the case.

A. S. Baskett, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—Appellant was indicted for murder, convicted of murder in the second degree and his penalty fixed at twenty years in the penitentiary. There is no bill of exception in the record. It is unnecessary to detail the evidence.

From all the evidence the jury were clearly authorized to believe and find appellant guilty of murder in the second degree. It shows

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that for some time prior to October 10, 1905, appellant occupied one of the three rooms in the house of Lucinda Jackson, the mother of the deceased; that he worked at night and slept there in the day time. One of the witnesses swears that said deceased slept in that room at night. Whether she did or not, she worked in the day time away from the house and slept at this house at night; that appellant had "kept" her for some time and was very much attached to her; that very recently before the killing another negro man became enamored with her and, it seems, she was about to discard appellant and was taking up with the other negro. One of the witnesses says appellant, all day of the night he killed deceased, had been sitting around the house crying and taking on and saying that Letitia (deceased) had treated him wrong; that she had gone back on him. On that day he borrowed a shotgun, procured shells and loaded it, claiming at the time he was going hunting. He took the gun with him to his room instead, and that night when deceased was entering the room he shot and instantly killed her, her body falling in the doorway. He immediately ran out of the room over her body and hid out all the balance of that night and, at least a part, if not all, of the next day. He claimed that he thought it was the other negro man coming into his room and did not know or think it was the deceased, claiming that said negro man had threatened to kill him and to come to his room for that purpose. He testified to such threats by said other negro man and testified and proved by others also, that the other negro man had repeatedly told him he had to let that woman (deceased) alone.

Among other things, the court specifically told the jury that if they believed the appellant shot deceased, believing at the time he was shooting said other negro, Joe Smith, and accidentally killed deceased, or if they had a reasonable doubt of it, to acquit appellant. Again, that if the jury believed that appellant believed that said Joe Smith was attempting by force to break and enter his room and when he did so, appellant shot and killed deceased, believing that he was shooting at Joe Smith and accidentally killed deceased to acquit him. And, again, that if they believed or had a reasonable doubt that the killing was accidental and that he did not intend to kill deceased and did not shoot, believing he was shooting, or intending to kill her, to find him not guilty. And in passing upon all these questions they were to view the circumstances from defendant's standpoint and as the same reasonably appeared to him at the time.

From all this the jury believed and found, and the evidence would sustain their belief and finding that appellant, because deceased had gone back on him and was taking up with the other negro, purposely planned to kill her and did kill her, knowing at the time it was deceased and not at the time believing or thinking it was the said other negro man. All these things were for the jury and we can not disturb their verdict.

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Appellant contends also that the court should have charged on manslaughter. He asked no special charge on that subject. His only complaint is in his motion for new trial as follows: "Because the court erred in not submitting to the jury in his charge the issue of manslaughter, such issue having been raised by the testimony." It has uniformly been held by this court that such an assignment is too general to require this court to pass upon the question. (Mansfield v. State, 62 Texas Crim. Rep., 631; Luster v. State, 63 Texas Crim. Rep., 541; Joseph v. State, 59 Texas Crim. Rep., 82.) But even if we could consider this assignment, after a careful review of the testimony, in our opinion, manslaughter is not raised. The special issues heretofore mentioned, submitted to the jury all the questions along that line that it was necessary or proper for the court to submit.

The evidence in no way raises adequate cause, and without this there can be no manslaughter. The verdict which finds the appellant guilty of murder in the second degree, as charged in the indictment, and "assess his punishment twenty years' confinement in the State penitentiary" is clearly sufficient, even though the word "at" between "punishment" and "twenty" in the quotation above was omitted. Sec. 897, White's Ann. C. C. P.

The judgment is affirmed.

Affirmed.

DAVIDSON, PRESIDING JUDGE.—I agree to affirmance, but if manslaughter had been suggested by the facts, the exception in the motion for new trial sufficiently raised that question.

[Rehearing denied April 2, 1913.—Reporter.]

PETE CREED V. STATE.

No. 2336. Decided March 5, 1913.

Rehearing denied April 2, 1913.

1.—Occupation—Intoxicating Liquors—Local Option—Change of Venue.

In the absence of a bill of exceptions to the overruling of an application for change of venue, the same cannot be reviewed on appeal, under Article 634, Code Criminal Procedure.

2.—Same—Special Judge—Term of Court.

Where the special judge had been elected, qualified and opened the District Court for the term, it remained open until the end of the term, unless sooner adjourned for the term by order of the judge presiding, and the temporary leaving of the judge did not adjourn the term.

3.—Same—Continuance—Bills of Exception.

In the absence of bills of exception to the overruling of an application for continuance and the admissibility of testimony, the same cannot be reviewed on appeal.

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4.—Same—Indictment—Date of Offense—Words and Phrases—Surplusage.

Where the words objected to with reference to the date of the offense could be treated as mere surplusage, and did not render the indictment in anywise uncertain as to the date of the offense, the same was sufficient on motion to quash.

5.—Same—Charge of Court—Occupation.

Where the court's definition of the word, "occupation," was according to approved precedent, there was no error in refusing requested charges which were not applicable. Following Fitch v. State, 58 Texas Crim. Rep., 236, and other cases.

6.—Same—Charge of Court—Law in Force.

Where the orders of the Commissioner's Court were introduced in evidence, the court could have charged that local option was in force, although he did not assume this in his charge, and there was no error. Following Byrd v. State, 53 Texas Crim. Rep., 507, and other cases.

7.—Same—Charge of Court—Agent—Principals.

Where the evidence conclusively showed that defendant controlled the place where all the sales were made and that he was the manager of said place and knew that his employer was selling intoxicating liquors, and besides, showed that defendant made numerous sales himself, etc., there was no error in refusing defendant's special charge that he could not be convicted as agent of said employer, as defendant was a principal.

Appeal from the District Court of Potter. Tried below before the Hon. John W. Veale, Special Judge.

Appeal from conviction of following the occupation of selling intoxicating liquors in prohibition territory; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Cooper, Merrill & Lumpkin, for appellant.—On question of court's charge in defining occupation: Simmons v. State, 55 Texas Crim. Rep., 441; 117 S. W. Rep., 141.

On question of court's charge on the weight of the evidence: Ratigan v. State, 33 Texas Crim. Rep., 301; Copeland v. State, 36 id., 575; Hughes v. State, 32 id., 379.

C. E. Lane, Assistant Attorney-General, for the State.—On question of special judge: Powers v. State, 23 Texas Crim. App., 42; Scott v. State, 68 S. W. Rep., 177.

On question of law in force: Williams v. State, 52 Texas Crim. Rep., 371; Kirksey v. State, 61 id., 298; Dozier v. State, 62 id., 258.

HARPER, JUDGE.—Appellant was prosecuted and convicted of the offense of pursuing the occupation of selling intoxicating liquors in prohibition territory, and his punishment assessed at two years confinement in the State penitentiary.

The term of court at which appellant was convicted adjourned on September 28, 1912. At this term appellant filed an application praying for a change of venue on grounds named in the application, which was overruled by the court. After the adjournment of court

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on November 4th, 1912, appellant filed two bills of exception, complaining of the action of the court in overruling his application for a change of venue. Article 634 of the Code of Criminal Procedure provides that an order of the court granting or refusing a change of venue shall not be reviewed on appeal, unless the facts upon which the same was based are presented in a bill of exception, prepared, signed, approved and filed at the term of court at which such order was made. The bill, not having been filed during the term at which the order was made, we are not permitted to review the action in refusing the change of venue.

In the only other bill of exceptions in the record it is shown that the term of court began on the 8th day of July, 1912, that being the time fixed by law. On this day the regularly elected Judge, Hon. J. N. Browning, being absent, the attorneys in attendance on court legally elected Hon. Jno. W. Veale, Special Judge, who took the oath of office, opened court, empaneled the grand jury, and transacted such other business as came before the court on that day. It further shows that on the second day of the term, the Special Judge, being called to another county, notified all parties that he would necessarily be absent for several days, and instructed the sheriff to open court each day, and adjourn until next morning. This to be done until he should return. He did not return until the following Monday, when he proceeded with the business of the court, and continued to hold court until Hon. J. N. Browning, the regular Judge, appeared and resumed his seat on the bench. Appellant insists that because the Hon. Jno. W. Veale left the county, after opening court, for more than three days, and instructed the sheriff to open court and adjourn until the next day, that on the third day of the Special Judge's absence, the court became, as a matter of law, adjourned for the term, and cites us to Articles 1678, 1684, and 1725, of the Revised Civil Statutes. These articles of the statute do not so provide, but on the other hand, provide for the election of a Special Judge on the first day of the term, when the regular Judge is absent, and the law was complied with in this respect. After the special Judge had been elected, qualified and opened court for the term, it remained open until the end of the term, unless sooner adjourned for the term by order of the Judge presiding.

In the motion for a new trial complaint is made of the action of the court in overruling the application for a continuance, and to the admissibility of certain testimony, but no bills of exceptions being reserved in regard to these matters we can not review them; so the sole questions presented are those that complain of the charge of the court and the refusal of the court to give the instructions requested, and the one to quash the indictment.

The indictment in this case is very lengthy and no useful purpose could be served by presenting it in full. The indictment is in form frequently approved by this court with one exception, and the ground

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presenting this reads as follows: "Because the offense charged herein is alleged to have occurred at an impossible date, to-wit: from and after Nov. 16, 1912." As the indictment was presented on July 16, 1912, if this is the proper construction to be given the instrument the motion would be good; but the indictment, after alleging when the election was held, and when it became effective, further alleges: "And thereafter, while said local option law prohibiting the sale of intoxicating liquors (in the county named) within the period of time between November 16, 1911, and the filing of this indictment, and anterior to the presentment of this indictment, Pete Creed did then and there unlawfully engage in and pursue the occupation and business of selling intoxicating liquors, and during said time did then and there unlawfully make at least two sales of intoxicating liquors, to-wit;" then names a number of persons to whom the sales were made, naming the date of each sale, all dates alleged being prior to the filing of the indictment herein. But in the concluding part of the indictment the year 1912, is written in one place, wherein 1911, should have been written, but if we exclude the words "the 16th day of Nov. 1912, when" where it occurs in the latter part of the indictment, the indictment would charge an offense; therefore, these words should be treated as surplusage. If these words rendered the indictment in anywise uncertain, then a different rule would prevail, but the part herein copied shows that appellant was charged with pursuing the occupation from Nov. 16, 1911, up to and inclusive of the date of filing the indictment, and the date of each sale is alleged anterior to the presentment of the indictment, and this being so, when a useless expression is inserted, which may and should be treated as surplusage, it presents no ground to quash the indictment. Mr. Branch, in his Criminal Law, correctly says the rule is: "If, eliminating surplusage, the indictment so avers the constituent elements of the offense as to apprise defendant of the charge against him, and enable him to plead the judgment in bar of another prosecution, it is good in substance, under our Code, and therefore sufficiently charges the offense." (See Sec. 905.)

The court defined occupation in words frequently affirmed by this court (Fitch v. The State, 58 Texas Crim. Rep., 366; Gillree v. The State, 60 Texas Crim. Rep., 301; Clark v. The State, 61 Texas Crim. Rep., 597; Dixon v. State, 66 Texas Crim. Rep., 270; 146 S. W. Rep., 914. Therefore, there was no error in the court refusing the special charge requested, these decisions all holding that such a charge should not be given.

The court did not assume in his charge that local option was in force, but he would not have erred if he had done so, the orders of the Commissioners Court having been introduced in evidence. Byrd v. State, 53 Texas Crim. Rep., 507; Romero v. State, 56 Texas Crim. Rep., 435; Sebastian v. State, 44 Texas Crim. Rep., 508; Shields v. State, 38 Texas Crim. Rep., 252.

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The court did not err in refusing defendant's special charge that although the jury might believe that D. R. Campbell was engaged in the occupation charged, yet if appellant was employed by him and he knew that Campbell was so engaged, he could not be convicted, etc. The evidence conclusively shows that Campbell had the Union Hotel rented; that this was the place where all sales were made; that appellant was the manager and had control of these premises, and while he denies making sales himself, yet he admits that he knew that Campbell was selling intoxicating liquors, and he was present when the sales were made by Campbell, and the other facts and circumstances in evidence would make him a principal in the commission of the offense if he never made a sale himself. But the evidence for the State shows that appellant made numerous sales from a drink at a time to any quantity of whisky a person desired. And neither was there any error in refusing the special charges requested, instructing the jury not to consider the testimony of J. W. Jones and Crafton. These witnesses shown that large quantities of intoxicants were hauled to Campbell's barn; that on one occasion, at least, appellant was present and assisted in placing the liquors in the barn; that these liquors were carried from this barn to the Union Hotel, where they were sold, appellant at times receiving such liquors at the hotel and paying the men for bringing the liquor from the barn to the hotel, and then the testimony would show that he would sell such liquors to whomsoever might call for liquor. A regular bar is shown to have been run at this hotel, selling whisky and beer by the drink and otherwise, appellant often waiting on the customers. Our statute provides that all persons are principals in the commission of an offense who are present at the commission thereof, knowing the unlawful intent, and aid in the commission thereof. The evidence in this case, under any and all phases of the law, makes appellant guilty of the offense charged, and the other special charges requested insofar as they are the law, were fully covered by the court in his main charge, and the judgment is affirmed.

Affirmed.

[Rehearing denied April 2, 1913.—Reporter.]

WILL ELLIS V. STATE.

No. 2335. Decided March 5, 1913.

1.—Selling Intoxicating Liquor—Local Option—Sufficiency of the Evidence.

Where, upon trial of a violation of the local option law, the evidence sustained the conviction, there was no error.

2.—Jury and Jury Law—Practice—Bill of Exceptions.

Neither side should be permitted to test jurors by showing that they would or would not give credence to the testimony of any witness for either side; besides, the bill of exceptions was defective in not pointing out the error.

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3.—Same—Challenge—Opinion of Juror.

Where, upon appeal, the bill of exceptions showed that defendant's claim that the juror had a formed opinion was not supported, but was shown that the juror was qualified, there was no error; besides, the juror was peremptorily challenged and did not sit on the case. Following Duke v. State, 61 Texas Crim. Rep., 441, and other cases.

4.—Same—Jury and Jury Law—Talesmen.

While the court should have granted the motion to place the names of the talesmen on separate slips of paper, etc., as the statute directs, yet, where the record showed on appeal that no injury whatever occurred by this action of the court and that no objectionable juror was forced upon the defendant, there was no error. Following Mays v. State, 50 Texas Crim. Rep., 165, and other cases.

5.—Same—Evidence—Bill of Exceptions.

Where the bill of exceptions did not show that any answer was given to the question which was objected to as leading, there was nothing to review. Following Carter v. State, 59 Texas Crim. Rep., 73.

6.—Same—Evidence—Impeaching Witness.

Upon trial of a violation of the local option law, there was no error in not permitting the defendant to ask a State's witness what he had sworn to in another case with a view of impeaching him, the matter having no connection with the case on trial.

7.—Same—Evidence—Impeaching Witness—Moral Turpitude.

It is always permissible to impeach a witness by showing that he has been indicted or is then under indictment for a felony, and the court correctly refused a special charge to the contrary.

8.—Same—Agency—Charge of Court—Alibi.

Where the evidence showed a specific and direct sale of intoxicating liquors by defendant to the witness, the court did not err in not submitting the question of agency to the jury, and in not charging that the question of alibi was thereby not affected.

9.—Same—Charge of Court—Limiting Testimony.

Where testimony could not be legitimately or rationally used for any other purpose than that of impeachment, it is not error to refuse to limit same for that purpose. Following Sue v. State, 52 Texas Crim. Rep., 122, and other cases.

10.—Same—Charge of Court—Alibi—Words and Phrases.

Where, upon trial of a violation of the local option law, the evidence raised the issue of alibi and the court gave a correct charge thereon, the contention that the use of the words "that if the offense was committed as alleged" was on the weight of the evidence was untenable.

11.—Same—Argument of Counsel.

In the absence of a bill of exception pointing out the error in the argument of State's counsel and a written charge withdrawing same, there was no error.

Appeal from the District Court of Potter. Tried below before the Hon. J. N. Browning.

Appeal from a conviction of a violation of the local option law; penalty, one year imprisonment in the penitentiary.

The opinion states the case.

J. A. Carlisle and *W. I. Busby,* for appellant.—On question of moral turpitude: Wright v. State, 63 Texas Crim. Rep., 429; 140

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S. W. Rep., 1105; Merriweather v. State, 55 Texas Crim. Rep., 438; 116 S. W. Rep., 1148; Hightower v. State, 60 Texas Crim. Rep., 109; 131 S. W. Rep., 324; Holmes v. State, 150 S. W. Rep., 926.

On question of argument of counsel: Crow v. State, 33 Texas Crim. Rep., 264; Kirksey v. State, 61 Texas Crim. Rep., 298; 135 S. W. Rep., 124.

C. E. Lane, Assistant Attorney-General, for the State.—On question of moral turpitude: Clay v. State, 65 Texas Crim. Rep., 402; 144 S. W. Rep., 280.

PRENDERGAST, JUDGE.—Appellant appeals from a conviction for unlawfully selling intoxicating liquor in prohibition territory with the lowest penalty—one year confinement in the penitentiary. The evidence is amply sufficient to sustain the verdict.

By bill appellant complains that in examining the jurors on their voir dire, the court refused to permit him to ask them this question: "Should it develop in the progress of this case that the State's witness, Charles Koethe, is in the employment of the Sheriff's department, would you give the same weight and credence to the testimony of said witness as were he not in such employment?" The bill states the purpose of this question was to ascertain if the prospective jurors would be prejudiced against or biased in favor of said State's witness because of such employment. The court, in allowing the bill, qualified it by stating he refused to permit the jurors to answer said question "because it tended to commit them on the question of what they thought of the credibility of the witness before he had testified." We have given the substance in full of the bill. It does not disclose that said witness was in the employ of the Sheriff's department or if so in what capacity, or for what purpose. As qualified by the court, the bill presents no error. Even if not qualified by the court, certainly neither side should be permitted to test jurors by showing that they would or would not give credence to the testimony of any witness for either side.

By another bill appellant complains that the court should have sustained his peremptory challenge to the juror Berkley, because he showed that he had formed an opinion as to the guilt or innocence of appellant. To take the whole bill, appellant's claim is not supported, but the juror is shown to be qualified. Even if his challenge should have been sustained, the bill clearly shows that the juror was then challenged peremptorily by appellant and did not sit in the case and no injury whatever is shown to appellant by his bill. Duke v. State, 61 Texas Crim. Rep., 441; Mays v. State, 50 Texas Crim. Rep., 165.

By another bill appellant shows that in making up the jury by challenges from both sides there were only eight accepted jurors; whereupon the court ordered talesmen summoned, which was done. When these talesmen were brought before the court, appellant pre-

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sented his written motion to instruct the clerk to place all names of these talesmen on separate slips of paper as near the same size and appearance as may be, place them in a box or other receptacle and shuffle them, after which each slip to be drawn by the clerk and the name thus drawn placed upon the jury list in the order in which they were drawn, as directed by statute. The court refused this motion, to which appellant excepted. This is the whole, in substance, of the motion and bill. Unquestionably the court should have granted this motion, as the procedure clearly prescribed by the statute directs it. Articles 713, 702, and 703, C. C. P. But as this was not done we look to the bill to see if any injury whatever occurred to appellant by this action of the court, or if any objectionable juror or any juror who was not fair and impartial was thus forced upon him. The bill nowhere and in no way shows any injury whatever to him by reason of this error of the court. This being the case, the error would not justify this court to reverse. Duke v. State and Mays v. State, supra.

Appellant's next bill complains that the court permitted the State to ask the witness Koethe a leading question. The bill does not show that any answer was given and is wholly insufficient to show any error. Carter v. State, 59 Texas Crim. Rep., 73.

By another bill appellant complains that the court would not permit him to ask said witness, Koethe, what he swore in another case, with a view of impeaching him. When he was asked what he swore in the other case had no connection whatever with this case, or any testimony of the witness in this case. The bill shows the court specifically told appellant that if he proposed to impeach the witness by showing he made different statements to what he makes now, about this case on trial, he would permit that, but he would not permit the testimony in the other case. No error is shown by this bill. It is unquestionably the law that no witness can be impeached on immaterial matters and about something that has no connection with the case on trial.

It is always permissible in this State to impeach a witness by showing that he has been indicted or is then under indictment on a felony charge. There was no error in permitting appellant's witness, Dunaway, to be thus impeached in this case and it would have been improper for the court to have given appellant's special charge to entirely disregard and not consider such impeachment as effecting the credibility of said witness.

As the evidence did not raise the question that appellant acted as the agent of said witness, Koethe, in procuring whisky for him, but showed a specific and direct sale and delivery by appellant to the witness, the court did not err in not submitting the question of agency to the jury, nor did it err on that account in not charging that the question of alibi was thereby not affected, even if the questions were so raised as to require this court to consider them.

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Appellant next complains that the court failed to charge limiting the fact that his witness, Dunaway, had been indicted for a felony, to the purpose of impeachment only. He asked no charge on the subject. The matter is shown to be this way: He objected to the State in its cross-examination of his witness Dunaway, proving by Dunaway that he himself had been indicted for selling intoxicating liquors, which was a felony, and that the indictment was pending in that court, because said testimony could not be introduced for the purpose of impeaching him. The court permitted the testimony for that purpose and overruled his objections. He then requested a charge telling the jury that such testimony did not impeach his witness and that they should not consider it for that or any other purpose. Then he now complains that if he is mistaken in all that, and the testimony was admissible, the court ought to have limited its effect to impeachment only.

"When testimony could not be legitimately or rationally used for any other purpose, it is not error to refuse to limit same for that purpose." Sue v. State, 52 Texas Crim. Rep., 122. This is the unquestioned rule in this State, specifically so held in Brown v. State, 24 Texas Crim. App., 170, and is so laid down by Branch's Crim. Law, sub-div. 3, sec. 873, page 555; and sec. 367, under which sections many other cases to the same effect are collated and cited.

The evidence called for and the court gave a correct charge on alibi, and committed no error in the use of the words "that if the offense was committed as alleged," in the charge on alibi, as follows:

"4. Among other defenses set up by the defendant is an alibi, that is, that if the offense was committed, as alleged, then the defendant was, at the time of the commission thereof, at another and different place from that at which such offense was committed, and therefore was not and could not have been the person who committed the same. Now, if the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the place where the offense was committed at the time of the commission thereof, you will find the defendant not guilty."

No reversible error is shown by appellant's last bill of exceptions complaining of a remark by the district attorney, in his closing argument. The bill is meager, does not show the attitude of the case in such a way as to show whether or not the language by the district attorney, complained of, could have in any way injuriously affected appellant. No written charge was requested that his remarks be not considered. The bill shows no error. Clayton v. State, 67 Texas Crim. Rep., 311; 149 S. W. Ap., 119, and authorities therein cited.

The judgment is affirmed.

Affirmed.

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Ex-Parte Edwin Cobb.

No. 2385. Decided March 5, 1913.

1.—Felony—Bail Bond—Statutes Construed—Surety.

Under Articles 322 and 330, Revised Code Criminal Procedure, a surety on a bail bond or recognizance on appeal has a right to surrender his principal and be released from liability on the undertaking; and the provisions of the code in regard to release of sureties on bail apply as well to bonds given before as after conviction. Overruling Talley v. State, 44 Texas Crim. Rep., 162.

2.—Same—Case Stated—Surrender of Principal by Surety.

Where appellant was convicted of a felony, gave notice of appeal and entered into bail bond pending his appeal, and thereafter his surety surrendered him to the sheriff and he subsequently escaped, but was recaptured, his contention that his surety had no right to surrender him and that the original bail bond is still in effect is untenable.

Appeal from the District Court of Fannin. Tried below before the Hon. Ben H. Denton.

Appeal from a habeas corpus proceeding asking release from arrest on the ground that his bail bond previously given was still in effect.

The opinion states the case.

Cunningham & McMahon, for relator.—Citing Jordan v. State, 59 Texas Crim. Rep., 208; 128 S. W. Rep., 139; Talley v. State, 44 Texas Crim. Rep., 162.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, Judge.—The facts in this case show that appellant was convicted of a felony and sentenced to a term in the penitentiary. He gave notice of appeal, and asked the court to fix the amount of his bail, pending his appeal. This the court did at $2500.

After the adjournment of court he gave bond in this sum and was released. While the case was pending on appeal, one of his sureties desired to be released from the bail bond, and carried relator to the sheriff and surrendered him. He subsequently escaped, but was captured by the sheriff and is now in jail in Fannin County.

He sued out a habeas corpus before Judge Denton, contending that the surety had no right to surrender him to the sheriff, nor to be released from his bail bond, and he is entitled to be released on the original bail bond. After hearing the case, Judge Denton remanded relator to the custody of the sheriff and he prosecutes this appeal.

Appellant's contention is that a surety on a bail bond or recognizance, on appeal has no right to surrender his principal and be released from liability on the undertaking. That the provisions of the Code in regard to release of surety on bail applies only to bonds given before conviction, and do not apply to bail bond given after conviction. And in this contention he is supported by the case of

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Tally v. The State, 44 Texas Crim. Rep., 162. We have searched our reports and find no other decision so holding, and according to our view of the law that decision is in direct conflict with the Code of Criminal Procedure and should not be followed, and it is hereby overruled. Article 330 provides that those who may have become surety for an accused person, may at any time release themselves of their undertaking by surrendering the accused into custody of the sheriff of the county where he is prosecuted.

And Article 322 provides that "the rules laid down in this chapter respecting recognizances and bail bonds are applicable to all such undertakings when entered into in the course of a criminal action, whether before or after an indictment or information, *in every case* where authority is given to any court, judge, magistrate or other officer, to require bail of a person accused of an offense."

This is broad enough and does embrace all bail bonds and the surety, by surrendering his principal to the sheriff, was released from his liability.

Therefore, the Judge of the district court did not err in remanding relator to the custody of the sheriff and the judgment is affirmed.

Affirmed.

I. A. BAILEY v. STATE.

No. 2007. Decided March 5, 1913.

1.—Theft of Horse—Accomplice—Sufficiency of the Evidence—Charge of Court.

Where, upon trial of theft of a horse as an accomplice, the court properly charged on accomplice testimony and the evidence was sufficient to sustain the conviction, there was no error.

2.—Same—Charge of Court—Accomplice Testimony.

Where, upon trial of an accomplice to the theft of a horse, the evidence did not raise the issue of accomplice with reference to the purchaser of said horse, there was no error in the court's failure to charge thereon.

3.—Same—Other Offenses—Limiting Testimony—Intent—System.

Where, upon trial of horse theft as an accomplice, the State was permitted to introduce testimony with reference to another theft of a horse prior to the instant case, without objection, and the testimony with reference thereto clearly showed the motive, system, and intent of defendant in committing the theft for which he was on trial, there was no error in the court's failure to specifically limit said testimony to this purpose, no charge being requested by defendant, and the other theft being clearly proven.

4.—Same—Rule Stated—Charge of Court—Limiting Testimony.

It is only when proof of another offense is such that the jury might use that testimony improperly to convict for that collateral offense instead of the offense charged and on trial, or make some other unwarranted use of that testimony to the prejudice of the defendant that it is necessary to limit the purpose for which such evidence is admitted. Following Thornley v. State, 36 Texas Crim. Rep., 118, and other cases. Distinguishing Saldiver v. State, 55 Texas Crim. Rep., 177; Reno v. State, 25 Texas Crim. App., 102.

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5.—Same—Case Stated—Other Offenses—Charge of Court.

Where defendant was on trial and convicted alone for the offense charged in the indictment, and could not have been convicted for any other offense, and the evidence concerning the other offense was admitted alone for the purpose of showing motive, system and intent for the theft upon which he was on trial as an accomplice, there was no error in the court's failure to limit the testimony to the purpose for which it was introduced.

6.—Same—Accomplice in Collateral Offense—Charge of Court.

Where, upon trial of theft of a horse by an accomplice, the State introduced the accomplice in another offense prior to the theft for which defendant was being tried, and which said witness was neither directly nor indirectly connected with the theft of the instant case, there was no error in the court's failure to charge either that said witness was an accomplice in the instant case, or that he was an accomplice in the other theft which was purely collateral matter.

7.—Same—Charge of Court—Article 743, Code Criminal Procedure.

Where, upon trial of theft of a horse as an accomplice, the testimony of another offense was introduced by an accomplice thereto without objection, and the appellant for the first time raised the question of the court's failure to charge on said accomplice testimony in his amended motion, and there being no injury shown to the rights of defendant, there was no error under Article 743, Code Criminal Procedure.

Appeal from the District Court of Hunt. Tried below before the Hon. R. L. Porter.

Appeal from a conviction of theft of a horse, as an accomplice; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

J. G. Matthews, for appellant.—On question of court's failure to charge on accomplice testimony with reference to the purchaser of the horse alleged to have been stolen: Johnson v. State, 58 Texas Crim. Rep., 244; 125 S. W. Rep., 16.

On question of the court's failure to limit testimony of other offenses: Taylor v. State, 17 Texas Crim. App., 46; Carroll v. State, 58 S. W. Rep., 340; Brown v. State, 24 Texas Crim. App., 170; Thomas v. State, 66 Texas Crim. Rep., 374; 147 S. W. Rep., 262; Irvin v. State, 1 Texas Crim. App., 301; Parr v. State, 38 S. W. Rep., 180.

C. E. Lane, Assistant Attorney-General, for the State.—On question of other offenses where testimony must be limited: Thornley v. State, 36 Texas Crim. Rep., 118; Martin v. State, 36 id., 125; Saldiver v. State, 55 id., 176; Gardner v. State, 55 id., 394; Wheeler v. State, 23 Texas Crim. App., 598; Burks v. State, 24 id., 326; Barnes v. State, 28 id., 29; Hanley v. State, 28 id., 375; McCall v. State, 14 id., 353; Riley v. State, 29 S. W. Rep., 40.

On question of other offenses where testimony need not be limited: Leeper v. State, 29 Texas Crim App., 63; Franklin v. State, 38 Texas Crim. Rep., 346; Sue v. State, 52 id., 122; Rice v. State, 54 id., 149; Wright v. State, 56 id., 353; Malcek v. State, 33 id., 14; Brown v.

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State, 41 id., 232; Harrold v. State, 46 id., 568; Wilson v. State, 60 Texas Crim. Rep., 1; 129 S. W. Rep., 613.

PRENDERGAST, Judge.—Appellant was convicted as an accomplice to horse-theft and given the lowest penalty.

The horse was charged to have been stolen by Monroe Adams. Adams testified against appellant and was sufficiently corroborated. The evidence was sufficient to establish that the day of the night of the theft appellant and Adams were together in appellant's field, where they had some conversation in the presence and in connection with others then present, about going to the Dallas Fair. When Adams got ready to leave and started, appellant accompanied him some distance from these others who were then at work, down to a certain gate, where they stopped and talked privately for some time. Adams testified that at this time they talked about going to the Dallas Fair, the next day, and he then told appellant he had no money to make the trip on; that appellant thereupon suggested that he, Adams, steal a horse that night, in effect designating the Hoard sorrel mare, ride it to Dallas, come back on the train to Royse and meet him the next day, and that he, appellant, would assist him in making the sale of the horse in Dallas, and that appellant loaned him $3 at that time for that purpose; that in accordance with that agreement, Adams did steal the Hoard sorrel mare, charged to have been stolen in the indictment, rode her to Dallas that night, arrived there in the night or early the next morning and put the mare in a certain wagon yard; that he took the morning train from Dallas and went back to Royse, where the appellant met him in accordance with the agreement. There were some three other persons, some of them relatives of appellant, who also were in Royse on that occasion and they all, that evening, went to Dallas; that appellant asked him, when he saw him in Royse on that occasion, how he had come out, and he told him all right. The appellant and Adams and the other accompanying parties, the others being in no way connected with the theft, went to Dallas on the late evening train. The five persons, after going around over the city somewhat, late at night, went to bed in the same room, the other three persons occupying one bed and appellant and Adams another. That early the next morning, Adams and appellant got up before the other three, slipped out and, after getting breakfast, Adams went to the wagon yard where he had put said mare, took her out of that wagon yard, and took her some distance to another, where he offered her for sale. Appellant met him at this wagon yard, where he was offering the mare for sale, and assisted him, and was present when he made the sale. It seems that Adams was a tall young man, seventeen or eighteen years old, and while only that old, was married; that he had worked as a hired hand for appellant and had been with appellant a good deal during the year the mare was stolen. Adams offered the mare to various

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persons, first pricing her at $85. Several persons attempted to buy her on this occasion, but the highest offer he had for her before he began dickering with Miller & Gillespie, was $50.

Miller & Gillespie were horse buyers and traders and had been buying horses on this occasion and lacked only a few, or perhaps one, of making up a sufficient number to ship away from there for sale. Their attention was called to the fact that Adams was trying to sell this mare and had been trying to sell her to others and they thereupon approached him about buying her. After dickering for some time, Miller & Gillespie, or Miller for them, offered Adams $65 for the mare, saddle and bridle. The saddle and bridle were second hand and had been used for some time. After dickering some time, Adams first asking more for the mare, he finally agreed to take $65 for her. Appellant was present at this time and Miller & Gillespie began to inquire of Adams about the title of the mare, and, seeing he was a young fellow, also about his age and whether or not he could sell and make a good title to the mare. Adams gave his name to these parties at the time as Muggins Scott, instead of his true name, Monroe Adams, and appellant went under the name of Elmer Reed. After agreeing upon the purchase of the mare at the stated price, they then asked him where he lived and he stated that he lived at Emory. When asked what county Emory was in he could not give the county. They thereupon asked appellant if he knew what county Emory was in and appellant could not tell. They then talked about telephoning to somebody at Emory to learn about Adams, but Adams protested he had no money to pay telephone charges. They thereupon asked appellant if he knew Adams and what about him, when appellant replied that he did know him and that Adams was perfectly all right and responsible, and appellant then suggested to the parties and to Adams, that he, Adams, had a brother-in-law, a barber, who lived in Dallas and suggested that they see Adams' brother-in-law about him; that was agreed upon by all parties and they all four started from there to hunt Adams' brother-in-law to ascertain whether Adams was all right and could make title to the mare. In going from the wagon yard to hunt up Adams' brother-in-law they all started together, but appellant soon suggested it was unnecessary for him to go with them and he quit them. The others went to Adams' brother-in-law and upon finding him in a barbershop, asked him about Adams, and his brother-in-law told them that Adams was all right, was a married man and was trading for himself; they thereupon became satisfied, concluded to trade and gave him a check for the money and took the mare. It is not shown that Adams and appellant were together any more that day until about or after night, when they met with the other three persons, whom they had stayed at the hotel with, at the depot. Adams claims in substance that he then informed appellant of what had been done about the sale of said mare, and then turned over to him $10 of the money.

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They all talked about returning home that night, but at the instance of Adams they finally concluded not to do so, he claiming that he was flush with money and proceeded to loan two or three of the others some money; besides, as he claimed, turning over to the appellant $10 of the money that he had gotten from the proceeds of the sale of said mare. He further testified that when appellant first suggested to him to steal the mare, and telling him that he would assist him in making the sale of her at Dallas, they agreed that they would divide the proceeds of the sale. Appellant also testified on the trial and denied advising Adams to steal the mare and claimed that his meeting him at Royse the evening of the day after he had stolen her the night before, and going with him to Dallas, and their sleeping together that night and getting up and slipping out before their other three companions got up, and his meeting Adams at the wagon yard, and what he said and did there, was all accidental, or not by pre-arrangement, and denied that Adams had paid him any of the money.

The court charged that Adams was an accomplice and gave a correct charge, to which there is no complaint, stating that he was an accomplice and that appellant could not be convicted upon his testimony without the proper corroboration, etc.

Appellant claims that the testimony was insufficient to sustain the conviction. We have carefully gone over it and in our opinion it was amply sufficient to sustain the conviction. Evidently the jury and the court below believed the State's witnesses and did not believe appellant.

Appellant also complains that the evidence tends to show that Miller, the purchaser of the mare from Adams, was an accomplice. He asked no special charge to that effect on the trial, and the first time he complains is in an amended motion for new trial. He then complained that the court erred in not submitting the question to the jury of whether or not Miller, said purchaser, was an accomplice and charging on that subject. In our opinion the evidence did not raise the question, hence, the court should not have charged on that subject.

The State also introduced uncontradicted evidence clearly showing that said Adams and Lewis White, together, stole another horse,—colt,—about two weeks or more before this Hoard mare was stolen by said Adams, known as, and designated by all the witnesses, the Cookson colt, and that they took that Cookson colt to Greenville in Hunt County about two weeks or more before the theft of the Hoard mare, and disposed of it with the assistance of appellant, and he got part of the proceeds, under circumstances somewhat similar to the disposition of the Hoard mare. There was no objection whatever to the introduction of this evidence, and no charge whatever requested by appellant on the subject.

By his amended motion for new trial, appellant, for the first time,

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complains that the court erred in omitting to charge: "(1) the theft or not of the Cookson horse," and it "(2) must be found to have been a theft." The theft of the Cookson colt was clearly proven by both Monroe Adams and Lewis White, and so conceded by appellant himself on this trial, and was not disputed. Hence it was not reversible error to fail to submit to the jury for a finding, what was without contradiction clearly established, even if it had been proper to submit that collateral question at all. Holliday v. State, 35 Texas Crim. Rep., 133; Nelson v. State, 35 Texas Crim. Rep., 205; Tracy v. State, 44 Texas Crim. Rep., 9; Elizardo v. State, 31 Texas Crim. Rep., 237; Pearce v. State, 35 Texas Crim. Rep., 150; Height v. State, 150 S. W. Rep., 908. "(3) That defendant is on trial alone for the offense charged in the indictment * * * and cannot be convicted for any other offense or upon any other transaction," and "(4) that any evidence introduced of and concerning the theft of the Cookson horse, or the defendant's connection with it, was admitted for the purpose of illustrating the motive, system and intent of defendant in committing theft of the horse for which he was on trial."

It is the settled law of this State that it is only when proof of another offense is such that the jury might use that testimony improperly to convict for that collateral offense, instead of the offense charged and on trial, or make some other unwarranted use of that testimony to the prejudice of the defendant that it is necessary for the court to charge limiting the purpose for which such evidence is admissible. Where the testimony is simply used to prove up the case as res gestae, or to prove any fact that forms a part and parcel of the case on trial so as to show the defendant's guilt, it is not necessary to charge limiting the effect of such testimony. These principles are so accurately and tersely expressed by Judge Hurt for this court, after the most careful consideration, in Thornley v. State, 36 Texas Crim. Rep., 118, we quote it: "Where the testimony is simply used to prove up the case as res gestae, or to prove any other fact that forms a part and parcel of the case, so as to show the defendant's guilt, and there is no probability of the jury convicting for the offense not charged, it is not necessary to limit the effect of the testimony. In fact, it is only necessary for the court to charge upon and limit said testimony when there is danger of a conviction for the offense not charged, or of an unwarranted use of the testimony to the prejudice of the defendant in the case in which he is being tried." Moseley v. State, 36 Texas Crim. Rep., 578; Leeper v. State, 29 Texas Crim. App., 63; Dugat v. State, 67 Texas Crim. Rep., 46, 148; S. W., 789, and cases there cited; Branch's Crim. Law, sec. 367 and cases there cited; Wright v. State, 56 Texas Crim. Rep., 353; Leslie v. State, 47 S. W. Rep., 367. This is not in conflict with the text and cases cited in Branch's Crim. Law, sec. 366, for it was held that evidence of other or collateral crimes was not admissible at all in those cases, and many others on the same line, or if

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the evidence was admissible, that it could be used to convict for such offense not charged, or for some other improper and injurious purpose. Take as an illustration of the first point, that the testimony was wholly inadmissible, Saldiver v. State, 55 Texas Crim. Rep., 176. Saldiver was charged with burglary of a certain house. On the trial, the State, over his objections, was permitted to prove other burglaries, one the day before, another the same day, and showed that stolen goods of those other two burglaries were found in his possession. Proof of these other burglaries was held inadmissible because "they serve to illustrate no point in this case." But the court also said: "Had appellant given an account of the property found in his possession taken from the burglarized house set out in the indictment, explanatory of innocent possession, the fact that he had possession of other stolen property taken from other burglarized houses, might have served to illustrate some questions which tended to connect him with this offense, but there was no evidence of this character. Appellant said nothing, and offered no testimony explanatory of his possession of the goods taken from the house set out in the indictment. The introduction of this testimony was injurious. It served to illustrate no purpose in the case and was not admissible."

Again, take as an illustration of the other point, Reno v. State, 25 Texas Crim. App., 110. In that case Reno was indicted for the theft of a horse from J. J. Davis. The court said: "It appears in evidence that at the same time and place of the theft of the horse named in the indictment, another horse, together with a saddle, was stolen, and the evidence which connects the defendant with the theft of the horse named in the indictment connects him also with the theft of said other horse and with the saddle.

"While this evidence of the theft of said other horse and the saddle was competent, and was not objected to by the defendant, still it was incumbent upon the court, in its charge to the jury, to explain the purposes for which such testimony was admitted, and to instruct and direct the jury that it could only be considered for those purposes, and that the defendant could not be convicted under this indictment for any other theft than the theft of the horse named in the indictment." There are a great many other cases along these same lines. So there are on the line we have cited above, maintaining our views in this case. Unfortunately, many of the decided cases do not always keep these distinctions clear. They frequently cite one or the other of these lines of decisions when possibly inapplicable to that particular case.

Unquestionably in this case, evidence was admissible to show appellant helped Adams and White to sell, and received a part of the proceeds of said stolen Cookson colt, in order to show his motive, system and intent in helping to dispose of the stolen Hoard mare, in view of his testimony claiming that he was only innocently present and

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only innocently helping Adams dispose of said Hoard mare and did not receive a part of the proceeds of the sale thereof. Appellant made no objections whatever to the introduction of said testimony, and in no way, in the lower court contended, nor does he in this court contend, that said evidence was inadmissible.

Now, let us apply the pleadings, evidence, charge and verdict in this case to see if the jury did or could have used the testimony about the Cookson colt to convict appellant as an accomplice to the theft by Adams and White of that colt; or could have used that testimony for any purpose other than, as appellant so aptly states it, "for the purpose of illustrating the motive, system and intent of defendant in committing theft of the horse for which he was on trial."

While there are several counts in the indictment, the court specifically submitted only the second, which was: (Omitting the formal part), "That Monroe Adams, on or about the 19th day of October, A. D. 1911, and anterior to the presentment of this indictment, in the County of Hunt and State of Texas, did then and there unlawfully and fraudulently take from the possession of H. J. Hoard a horse, the same then and there being the corporeal personal property of and belonging to the said H. J. Hoard, without the consent of the said H. J. Hoard, and with the intent then and there on the part of him, the said Monroe Adams, to deprive the said H. J. Hoard of the value of the same and to appropriate the said horse to the use and benefit of him, the said Monroe Adams; and * * * that I. A. Bailey, in the County of Hunt and State of Texas, and anterior to the presentment of this indictment, and before the commission of the said theft of the horse by the said Monroe Adams aforesaid, to-wit: on or about the 18th day of October, A. D. 1911, did unlawfully and faudulently advise, command and encourage the said Monroe Adams to do and commit the said theft of the horse, as above alleged, he, the said I. A. Bailey, not being personally present when said offense was committed by the said Monroe Adams."

There is nothing whatever directly or indirectly, in this count of the indictment about the Cookson colt, nor anything therein which can be tortured into anything about the Cookson colt.

The evidence shows that the evening before the Hoard mare was stolen, appellant advised Adams to steal a horse that night, ride it to Dallas and he would help him there to dispose of it. Adams told him he didn't know where to get a horse; appellant directed him to get one out of the Thompson pasture, and they then discussed, and, in effect, agreed that it should be said Hoard sorrel mare. Adams alone that night stole said Hoard mare, rode it to Dallas that night, appellant then met him, went to Dallas with him, where he assisted Adams the next day to sell her to Miller & Gillespie in Dallas, and they had a partial division of the proceeds. They got $65 cash for her. All this occurred on October 18, 19, and 20, 1911.

Some two weeks or more before this, said Adams and one Lewis

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White together, stole the Cookson colt out of the Kuykendall prairie or pasture and took it to Greenville in Hunt County. Appellant did not advise these parties or either of them to steal said colt or any other horse at or prior to said time and did not know they had done so until the next day, when he met them in Greenville. They then and there, for the first time, told him of their theft of this colt the night before and sought and obtained his aid in disposing of that colt in Greenville for part of the proceeds thereof. They got $35 cash and an old gray horse for said Cookson colt.

It is thus seen that the mare that Adams alone is charged in said count of the indictment to have stolen, and as an accomplice for the theft of which appellant was on trial and convicted, was shown, without doubt and without question, to be a sorrel mare and to belong to H. J. Hoard and to have been stolen from him by Adams alone on October 18 or 19. This mare was thoroughly identified as the one Adams sold to Miller & Gillespie in Dallas on or about October 20, 1911, with appellant's assistance. The other colt, described by all the witnesses as a colt, was stolen some two weeks or more before the Hoard mare was stolen, and belonged to a man by the name of Cookson, and was stolen,—not by Adams alone,—but by him and Lewis White together and was taken to Greenville in Hunt County, where appellant assisted them there to sell it and got a part of the proceeds of that sale. The two transactions were entirely separate and distinct, the description of the horses was entirely different, and neither could be mistaken for the other. They belonged to different persons and were stolen from different localities and out of different pastures and were disposed of at different places and at different times.

The court, in submitting the issues for a finding, clearly and distinctly required the jury to believe beyond a reasonable doubt, that Adams unlawfully and fraudulently took from the possession of said Hoard—not from any other—a horse on or about October 19, 1911, without Hoard's knowledge and consent, etc., and further required the jury to believe beyond a reasonable doubt that appellant, before the commission of the theft of that horse—not any other—did unlawfully and fraudulently advise, command or encourage the said Adams to do and commit the theft of that horse—not any other—before they could find the appellant guilty; and further charged, in a separate paragraph, that if they had a reasonable doubt as to whether appellant advised, commanded, or encouraged said Adams to commit the theft of the Hoard horse—not any other—to acquit him.

The verdict of the jury is very significant. It is: "We, the jury, find the defendant, I. A. Bailey, guilty as charged in the second count of the indictment, and we assess his punishment at two years' confinement in the penitentiary."

From all this, it is undoubtedly shown that appellant was on trial and convicted alone for the offense charged in the above copied count of the indictment, and could not have been and was not convicted

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for any other offense or upon any other transaction; and that the evidence of and concerning the theft of the Cookson colt, or the appellant's connection therewith was admitted and considered alone for the purpose of showing his motive, system and intent in the theft of the Hoard mare, or rather his advising, commanding or encouraging Adams to steal her. Hence, none of appellant's contentions on this point show any reversible error.

The only other complaint by appellant was also presented first in the court below by his amended motion for new trial. It is: "The court erred in his failure to apply the law of accomplices to Lewis White, but should have instructed the jury that if Lewis White was an accomplice, or if they believed he was an accomplice to the taking of the Cookson horse, then, before they could convict the defendant upon his testimony, they would have to find that the same was true, and that it showed the guilt of the defendant, and that the same was corroborated by other testimony tending to connect the defendant with the commission of the offense, for the reason that said charge was material to the defendant; second, that said Lewis White was a material witness for the State to establish the theft of the Cookson horse; third, the testimony of the said Lewis White in the Cookson case was material to the State in establishing the motive, and intent of the defendant in this case, the purpose alone for which it could be used in this case. To which action of the court in his failure to so instruct the jury the defendant excepts, as will fully appear in bill of exceptions No. 3." There is no bill No. 3, or other bill in the record.

The evidence in no way intimates, and as we understand, appellant in no way claims, that Lewis White was in any way, either directly or indirectly, connected with the theft by Adams, or the disposition, of the Hoard mare. No charge whatever was, therefore, necessary or proper to be given as to his being an accomplice to the theft of the Hoard mare. As stated above, the court did give a charge that Adams was an accomplice to the theft of the Hoard mare, and required, by proper charge, that his testimony should be corroborated as to the theft of that mare so far as appellant was concerned.

It is uncertain from the last above quoted ground of complaint of appellant whether his contention is that the court should have submitted whether Lewis White was an accomplice to the theft of the Hoard mare, or to that of the Cookson colt. But we will discuss the question from the standpoint that appellant's contention is that the court should have given a proper charge on the theory that he was an accomplice in the theft of the Cookson colt. It is elementary, since the enactment of Art. 743 Criminal Court Procedure as it now is, that we can consider only such objections to charges given or omitted, which are raised in the court below, either by bill of exceptions or motion for new trial. There is no bill of exception in the record on this or any other point. The question is then raised solely

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by this amended motion for new trial, copied in full above. No complaint whatever was made in the court below, or in this, that the court should have given, or failed to give, any charge to the effect that said Adams was an accomplice to the theft of the Cookson colt. He testified fully and substantially as to that transaction, the same as Lewis White did. "It is well settled in this State that the erroneous admission of testimony is not cause for reversal if the same fact is proven by other testimony not objected to." Wagner v. State, 53 Texas Crim. Rep., 306; West v. State, 2 Texas Crim. App., 460. We think the same principle applies to this question. If White was an accomplice to the theft of the Cookson colt, certainly Adams was. As Adams testified fully and substantially the same on this point, and no objection whatever is made in this or the lower court of the omission by the court to charge that Adams was an accomplice, etc., no reversible error is shown when such charge was not given as to Lewis.

Again, we think it was unnecessary to charge that White was an accomplice to the theft of the Cookson colt in this case, because that was solely a collateral matter. The court does not always, tho' some times does, have to charge on collateral matters, for, if it always had to be done, the main issue, and the merits of the case on trial, would, in all probability in most cases, be entirely lost sight of. As an illustration, the State, if it had been a fact, could have proven a large number of collateral thefts and the disposition of stolen property with which appellant was directly connected, as he was with the Cookson colt. Then if the court had to charge as to each of these several collateral thefts, the same as if the party on trial for each of them, then most assuredly the main issue in the case on trial would be lost sight of and the jury's minds and their attention distracted from the main issue to these several collateral matters. Again, White's testimony in no way was essential to connect, nor did it in fact connect, appellant with the theft of the Hoard mare. It simply and solely connected him with the disposition of the Cookson stolen colt. Appellant's connection with the Cookson colt and all the testimony in the record thereabout, was introduced solely for the purpose of showing appellant's motive, system and intent of the disposition of the Hoard mare stolen by Adams. So that, altogether, in view of said Art. 743, which specifically prohibits this court from reversing a case wherein an omission has been made in the charge of the court, unless such error "was calculated to injure the rights of the defendant," it is our opinion that appellant's contention on this point presents no reversible error. The judgment is, therefore, affirmed.

Affirmed.

DAVIDSON, Presiding Judge, dissents.

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BILL GREEN v. STATE.

No. 2017. Decided March 5, 1913.

1.—Murder—Evidence—Absent Witness.

Where the State showed the absence of a witness on a former trial and inferentially left the impression that the testimony of the said absent witness was favorable to the State, the defendant should have been permitted to show that such testimony was favorable to defendant, and a refusal to permit him to do so was reversible error. Following Sweeney v. State, 65 Texas Crim. Rep., 593.

2.—Same—Absent Witness—Reproduction of Testimony.

The mere fact that the witness was absent would not authorize his former testimony to be reproduced, unless it was shown that he was dead, beyond the jurisdiction of the court, or intentionally kept away. Following Robertson v. State, 63 Texas Crim. Rep., 216.

3.—Same—Charge of Court—Manslaughter.

Where defendant had been acquitted at a former trial of both degrees of murder, the court correctly charged upon manslaughter.

4.—Same—Evidence—Bias of Witness.

It is always permissible to prove the bias and prejudice of any witness by himself, and if he denies by another.

5.—Same—Aggravated Assault—Charge of Court—Intent—Deadly Weapon.

Where, upon trial of manslaughter after an acquittal of murder, the evidence showed that there was no proof that the instrument used by the defendant was a deadly weapon, and he testified that he did not intend to kill and there was also testimony that the deceased began the difficulty by an assault upon defendant, the court should have submitted aggravated assault as requested.

Appeal from the District Court of Knox. Tried below before the Hon. J. A. P. Dickson.

Appeal from a conviction of manslaughter; penalty, five years imprisonment in the penitentiary.

The opinion states the case.

L. W. Dalton, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.—On question of aggravated assault: Hill v. State, 11 Texas Crim. App., 456; Thompson v. State, 24 id, 383; Boyd v. State, 28 id, 137; Wilson v. State, 49 Texas Crim. Rep., 50; Lucas v. State, 49 id, 135; Terrell v. State, 53 id, 604.

PRENDERGAST, JUDGE.—Upon a charge of murder, appellant was convicted of manslaughter and his penalty fixed at the highest.

As this case must be reversed we do not comment upon the evidence, nor state it other than is necessary to decide the questions raised. This was the fourth trial of this case, the other three resulting in hung juries.

In all three of the other trials the State had produced and had to

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testify for it, the witness Ed Cope, who was absent at this trial. Said Cope was an eyewitness to the killing. It was, therefore, permissible for the State to show that it had theretofore had and introduced him as a witness. The object and purpose of this, however, inferentially at least, was to show that the testimony of this witness, if present, would be again favorable to the State. The appellant denied that the testimony of this witness was favorable to the State, and contended that it was favorable to him. As the State had proved as above stated, it was competent for the appellant to prove the testimony of this witness, and thereby show it was not favorable to the State, but if anything in his favor. It would certainly be unjust to the appellant to permit the State to show the absence of a witness and that on all former trials it had him present and used his testimony in behalf of the State, and thereby indirectly, at least, tend to show his testimony was for the State and against appellant, and not permit the appellant to prove to the contrary. So that, while the court did not err in admitting the testimony of Mr. Dalton, having admitted that, it did err in not permitting the defendant to prove the testimony of the absent witness and thereby rebut the inference in favor of the State. (Sweeney v. State, 65 Texas Crim. Rep., 593, 146 S. W., 883.) The mere fact that the witness was absent would not otherwise authorize his former testimony to be reproduced, unless and until he was shown to be either dead or out of the State, or his presence prevented by appellant, except for the purpose, and under the circumstances above stated. Robertson v. State, 63 Texas Crim. Rep., 216.

The evidence does raise the issue of manslaughter and the court did not err in charging thereon. The appellant having been acquitted of murder in the first and second degree, in another trial it will be necessary to charge on manslaughter.

Bill Doss was an important witness for the defendant and gave material testimony in his favor. The court did not err in permitting the State to ask and prove by him on cross-examination that the early morning after the killing the night before, he had gone to and asked Will Prather and others if they had heard anybody say that he was implicated in the cutting of the deceased. It is always permissible to prove the bias and prejudice of any witness by himself, and if denied by him, by another. This evidence tended to show that the witness Doss recognized that his connection with the fatal difficulty was such as to show that he was biased in favor of appellant.

The appellant contends that the evidence raised, and the court should have charged on, aggravated assault. In our opinion his contention is correct.

The uncontradicted evidence shows that the appellant was a young fellow about seventeen years old, rather small in stature; at least so, when compared with the deceased and was a year or more younger than the deceased, weighed only a little more than 120 pounds, while

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the deceased weighed considerably more; that the deceased was a much larger, taller, and stronger man than the appellant. It further shows that some ill-feeling had arisen between the two parties. The deceased, in a quiet and peaceable manner, just before the killing, invited the appellant out telling him that he wanted to see him. Some of the witnesses say that he invited appellant alone; others, that he invited appellant and said Doss. At any rate, the three persons went out of the yard at the gate of the house where they were attending a party, some little distance to a well, where the three persons stopped. Cope, the other eyewitness, followed within some fifteen feet of them, and he also stopped. The testimony also shows that after some words briefly between them, deceased struck and knocked appellant down and jumped on him and began beating him. Among other things, appellant testified that after deceased knocked him down and got on him, "he hit me four or five times. When I fell I ran my hand in my pocket and got my knife to cut him off of me. I did not intend to kill him; he was so much bigger than I was, I just wanted to cut him off of me. My intention was just to make him get off of me. I did not intend to cut him in any fatal place; did not intend to kill him."

There is no direct evidence in the record that the knife with which appellant cut and killed deceased was a deadly weapon. While it was identified and introduced in evidence, the record in no way discloses its size, nor directly that it was a deadly weapon, or other than an ordinary pocket knife. The mere fact that appellant testified that he did not intend to kill the deceased and that he intended to merely cut him to make him get off of him, and that he did not intend to cut him in any vital point, might not of itself reduce the killing to aggravated assault. His intent is to be measured and determined by the jury by all the facts and circumstances in evidence as well as his testimony on this point. The facts show that he cut the deceased some six or seven times. Once in the left breast in the region of the heart,—a vital point; another time, he cut and severed the large artery in the thigh, another vital point. The character of the instrument with which the wounds were inflicted and the manner of its use, are to be considered, as well as appellant's said testimony, in determining his intent with which the cutting and killing was done. However, all these matters were for the jury. As stated above in our opinion the evidence clearly raised, and the court should have submitted, the question of aggravated assault to the jury under appropriate instructions in accordance with the testimony. Arts. 1147, 1149, and 1150 P. C. and cases cited in sec. 434 Branch's Crim. Law of Texas.

There is no other question raised likely to occur on another trial; so that it is unnecessary to discuss any other question.

For the errors pointed out the judgment is reversed and the cause remanded.

Reversed and remanded.

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ALICE SKINNER V. STATE.

No. 2323. Decided March 5, 1913.

1.—Theft—Indictment—Different Offenses.

Where defendant was indicted for a misdemeanor theft in one count and in another for pulling down and injuring the fence of another, which grew out of the same transaction, there was no error in overruling a motion to quash on the ground that the offenses charged did not arise out of the same transaction.

2.—Same—Sufficiency of the Evidence.

Where a conviction of theft of wire was supported by the evidence, there was no error.

3.—Same—Name of Injured Party—Indictment.

Where the allegation of the party injured was such that it could not mislead anyone, and that the use of another name which had no connection with the transaction was clearly a clerical error and could not vitiate the indictment, there was no error in overruling a motion to quash. Following Bailey v. State, 63 Texas Crim. Rep., 584.

4.—Same—Verdict—Words and Phrases.

Where the verdict used the word "jurors" instead of the word "jury," the same was, nevertheless, sufficient under the statute.

5.—Same—Assignment of Errors—Practice on Appeal.

This court cannot consider questions raised by assignment of errors like in the civil courts, but is restricted to questions raised by bills of exception or motion for new trial.

Appeal from the County Court of Coke. Tried below before the Hon. G. S. Arnold.

Appeal from a conviction of misdemeanor theft; penalty, a fine of $25 and one day confinement in the county jail.

The opinion states the case. The evidence showed that the offenses charged grew out of the same transaction.

W. C. Merchant and *D. I. Durham*, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.—On question of sufficiency of indictment: Day v. State, 21 Texas Crim. Rep., 214.

PRENDERGAST, JUDGE.—Appellant was indicted in two counts, —the first charging that he did unlawfully break, pull down and injure the fence of F. C. Matthers without his consent. The other charges theft of wire from said Matthers of the value of $1. Both counts were submitted to the jury for a finding by the court. The jury by its verdict found him guilty of theft under the second count and assessed his punishment at a fine of $25 and one day in jail.

No motion whatever was filed in the lower court, other than a motion for new trial. The questions raised by that motion are also presented by bill of exceptions to the overruling of the motion for new trial on that particular ground. The evidence is amply sufficient to sustain

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the verdict. There are but three questions raised necessary to be decided.

One is appellant claims that the indictment was invalid because there were two counts therein, claiming that they did not arise out of the same transaction and, therefore, the conviction could not be sustained. This has many times and uniformly been decided against appellant by this court and is unquestionably settled. Gould v. State, 66 Texas Crim. Rep., 112, 147 S. W. Rep., 247; Tucker v. State, 65 Texas Crim. Rep., 627, 145 S. W. Rep., 611, and cases cited in both of these decisions.

Another question appellant raises is that the second count of the indictment is fatally defective in that in the last part thereof, instead of giving the name F. C. Matthers, it gives the name F. C. Manner. No motion was made to quash or in arrest of judgment on that account. In order to show this question fully, we will quote that count in the indictment, omitting the first and formal parts thereof. It is: "That Alce Skinner in the County of Coke and State of Texas, did on or about the 1st day of February, 1912, unlawfully and fraudulently take from and out of the possession of F. E. Matthers one hundred and fifty feet of wire, the same then and there being the corporeal personal property of the said F. C. Matthers and being of the value of one dollar, the said wire being taken without the consent of the said F. C. Matthers from the possession of the said F. C. Matthers and with the intent then and there on the part of him the said Alce Skinner to deprive the *said* F. C. *Manner* of the value of said wire and with the intent to appropriate the same to the use and benefit of him the said Alce Skinner." By the testimony and in no other way in the record is any one by the name of "Manner" in any way connected with the transaction.

Taking this count of the indictment as a whole, it is perfectly apparent that by some clerical error the name "F. C. Matthers" was given as "F. C. Manner." But the use of the name "Manner" at the place where it is, instead of the name "Matthers" could not and did not mislead appellant, nor anyone else. In view of our statutes on the subject of the certainty required in indictments, this indictment is perfectly good and the court did not err in not granting a new trial on that ground of appellant's motion for new trial. Bailey v. State, 63 Texas Crim. Rep., 584; Compton v. State, 67 Texas Crim. Rep., 15; 148 S. W., 580; Ferrell v. State, 152 S. W. Rep., 901; Martinez v. State, 51 Texas Crim. Rep., 584; Emmons v. State, 43 S. W., 518; Rowan v. State, 57 Texas Crim. Rep., 625; Feeny v. State, 62 Texas Crim. Rep., 585, and authorities there cited; Gentry v. State, 62 Texas Crim. Rep., 497.

The other complaint is that the verdict of the jury is insufficient and fatally defective. The complaint on this point is that where it says, "we, the *jurors,* find," it should say, "we, the *jury* find." In our opinion while the word "jury" is usually used in verdicts and the

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forms prescribed that word to be used, the word "jurors," instead, clearly means and is the same thing. The verdict is unquestionably sufficient. Sec. 897 White's Ann. C. C. P.

This court can not consider questions raised by assignment of error like the civil courts do. We are restricted by the statute to questions raised by bills of exception or in the motion for new trial. The evidence, being amply sufficient to sustain the verdict in this case, there is no other question raised necessary to discuss or decide. The judgment is affirmed.

Affirmed.

ALBERT PECH V. STATE.

No. 2319. Decided March 5, 1913.

1.—Theft of Mules—Practice on Appeal—Sufficiency of the Evidence.
In the absence of bills of exception to the admission of testimony and objections to the refusal of requested charges, these matters cannot be reviewed, and the evidence supporting the conviction, there is no error.

2.—Same—Charge of Court—Bailment—Venue—Words and Phrases.
Upon trial of theft of mules as bailee, where the court properly charged that if the defendant obtained possession then and there and fraudulently converted same, etc., to find him guilty, there was no reversible error on the ground that the words, "then and there," did not sufficiently instruct the jury on the venue of the case.

3.—Same—Charge of Court—Bailment.
Where defendant was charged with theft of mules under bailment and contended that he had not sold the mules, but left them in charge of another for the owner, and this issue was fairly submitted to the jury who found adversely to defendant, there was no error.

4.—Same—Newly Discovered Evidence.
Where, upon trial of theft of mules under bailment, the conviction was amply supported by defendant's confession and other testimony, there was no error in overruling a motion for new trial on the ground of newly discovered evidence, where the record showed a want of diligence to obtain this testimony and that besides, it was not probably true.

Appeal from the District Court of Bell. Tried below before the Hon. John D. Robinson.

Appeal from a conviction of theft of mules; penalty, two years' imprisonment in the penitentiary.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was convicted of the theft of two mules, and his punishment assessed at two years confinement in the State penitentiary.

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There are no bills of exception in the record to the admissibility, or rejection of any testimony, and no special charges requested. The testimony fully supporting the verdict, the only questions to be reviewed are the complaints of the charge of the court as given.

The court charged the jury that if appellant obtained the possession of the mules in Bell County, and *did then and there* fraudulently convert same to his own benefit without the consent of the owner, he would be guilty. As this is a prosecution for theft by bailee, appellant contends that the use of the words "then and there" did not sufficiently inform the jury that before appellant could have been convicted he must have conceived the fraudulent intent to convert the mules to his own use in Bell County. The criticism is without merit. No other construction can be given the language used by the court than that it instructs the jury the conversion must have taken place in Bell County.

Defendant's whole defense on the trial was that he did not convert the mules to his own use, and had not sold them, but left them with Mr. John Smith to be kept until the owner should call for them. This issue was fairly and in appropriate language submitted to the jury, and they were told if they so believed from the evidence or had a reasonable doubt thereof, they would acquit defendant. The jury found adversely to this contention, and it is not surprising that they did do so when we read the confession of defendant made shortly after his arrest, together with the other testimony offered in behalf of the State.

The contention in the motion for new trial that if Mr. Smith had been in attendance on court, he would have supported appellant's testimony, that he had not sold the mules, presents no ground for a new trial. Appellant was arrested on the indictment in March, he was released on bond; the case was not tried until the following July, yet appellant had made no application to have Smith summoned, and made no motion to postpone, or continue the case on account of his absence. Under such circumstances, the confession of defendant, and the testimony of Mr. Osburn and others, the court could reasonably conclude that if Mr. Smith was present he would not so testify, and if he did it would not be probably true. At any rate, no diligence was used to secure the witnesses, and it could not have been newly discovered evidence, for if Smith knew these facts, it was as well known to defendant when he was arrested in March as it was in July after the trial and verdict.

The judgment is affirmed.

Affirmed.

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FERRIS PRICE V. STATE.

No. 2322. Decided March 5, 1913.

Aggravated Assault—Motion for New Trial—Bill of Exceptions.

Where the record contained no evidence of the allegation that defendant was induced to plead guilty and the matter was not properly verified by bills of exception, the same could not be considered on appeal.

Appeal from the County Court of Haskell. Tried before the Hon. A. J. Smith.

Appeal from a conviction of aggravated assault; penalty, a fine of $100 and thirty days confinement in the county jail.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—This is a conviction for aggravated assault.

The statement of facts is not incorporated in nor accompanies the record, nor does the record contain any bill of exceptions.

The motion for new trial sets up the fact,—first, that appellant pleaded guilty on the advice of his father and that his father induced appellant to plead guilty on the representation of the County Attorney, and that by such representations they were both induced to believe defendant would receive the lowest punishment. This is not verified in any manner. It is signed, however, by defendant through his counsel. The record does not contain any evidence introduced in support of the allegation, nor was any bill of exception reserved verifying the matter mentioned. The same may be said about the allegations contained in the second ground of the motion.

The judgment is affirmed.

Affirmed.

LEANDRO CHAPA V. STATE.

No. 2324. Decided March 5, 1913.

1.—Murder—Statement of Facts.

Where the alleged statement of facts is not signed by the attorneys trying the case and is not approved by the trial judge, the same could not be considered on appeal.

2.—Same—Practice on Appeal—Presumption.

In the absence of a statement of facts, it must be presumed that the evidence supported the conviction and that the court properly charged the law and all the law applicable to the evidence.

Appeal from the District Court of Bee. Tried below before the Hon. F. G. Chambliss.

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Appeal from a conviction of murder in the second degree; penalty, five years imprisonment in the penitentiary.

The opinion states the case.

John Baker, and *W. G. Galyle* and *John R. Beasley*, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was prosecuted and convicted of murder in the second degree and his punishment assessed at five years confinement in the State penitentiary.

There is no statement of facts accompanying the record we can consider. There is what purports to be a statement of facts made in question and answer form but it does not bear the signature of the attorneys trying the case, neither has it been approved by the district judge.

The first ground of the motion complains of the insufficiency of the testimony. Not having the evidence before us, we must presume that it supported the verdict. Neither can we determine whether or not the court erred in refusing to charge on manslaughter.

Neither can we review the charge of the court on account of the alleged errors, nor the failure to give the special charge requested. In the absence of a statement of facts, we must presume the court charged the law, and all the law applicable to the evidence. The court submitted the offense charged in the indictment, and while it might have been more desirable that the law be applied more directly to the facts in the case, as contended by appellant, but not having the evidence before us, we can not determine whether the court did or did not sufficiently do so.

The judgment is affirmed.

Affirmed.

C. O. TURNER V. STATE.

No. 2325. Decided March 5, 1913.

Burglary—Declarations of Defendant—Charge of Court.

Where, upon trial of burglary, defendant's statement as to his possession of the alleged stolen property was properly submitted to the jury, there was no reversible error.

Appeal from the District Court of Travis. Tried below before the Hon. Chas. A. Wilcox.

Appeal from a conviction of burglary; penalty, five years imprisonment in the penitentiary.

The opinion states the case.

No brief on file for appellant.

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C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was convicted of burglary. His punishment was assessed at five years.

The substance of the appellant's contention for reversal is that the evidence does not support the conviction. The burglarized house was a saloon. It was entered after midnight by someone and quite a lot of property taken,—money, whisky, a gun and a knife. Appellant left town an hour or two after the house was burglarized on the train for San Antonio. The next morning he was arrested and incarcerated; an officer went from Austin to San Antonio and found in appellant's possession the gun, some money, some of the stolen whisky and the knife. Appellant's statement subsequently made to the officer was that he had gotten the property from some one after one or half after one o'clock the night of the burglary and before he left on the train about three o'clock, or shortly after three o'clock, and had paid $7 for the goods so found in his possession. The gun was what the witnesses called a Winchester 30-30, and he had the whisky and the other articles which had been taken from the burglarized house. He had given some whisky of the same brand to a prostitute in Austin, before leaving on the train. It is unnecessary to go into a detailed statement of all the circumstances connected with the burglary, the finding of the property, and the statement of the appellant. The statement of appellant was submitted to the jury for their consideration; that if true, or they had a reasonable doubt of its truthfulness, they should acquit. We are of opinion the jury were justified in reaching the conclusion that his statement was not true. Without summing up this testimony pro and con, we are of opinion the jury were correct in finding appellant guilty, and the judgment is affirmed.

Affirmed.

B. C. POWERS v. STATE.

No. 2330. Decided March 5, 1913.

1.—Theft of Cattle—Charge of Court—Bill of Sale.

Upon trial of theft of cattle, there was no error in the court's refusal to charge the jury that if they believed that if the alleged stolen animal was one of the animals described in the bill of sale from defendant to the party injured, to acquit defendant; the evidence showing that one of the alleged animals was positively identified as one of the alleged stolen animals.

2.—Same—Jury and Jury Law—Opinion of Juror.

Where counsel for defendant had knowledge of the facts with reference to the expressed opinion of the juror at the time the jury was selected, the contention that the juror had formed and expressed an opinion prior to the trial came too late.

3.—Same—Misconduct of Jury—Allusion to Defendant's Failure to Testify.

A mere incidental reference in the jury room to the failure of defendant to testify is not a cause for reversal.

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Appeal from the District Court of Zavala. Tried below before the Hon. R. H. Burney.

Appeal from a conviction of theft of cattle; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.—On question of misconduct of jury: Wilson v. State, 39 Texas Crim. Rep., 365; Guinn v. State, 39, id, 257.

HARPER, JUDGE.—Appellant was prosecuted for the theft of one head of cattle and his punishment assessed at two years imprisonment in the penitentiary,—the punishment in this case being made cumulative of another conviction for theft had at a previous term of the court.

The testimony in this case shows that the animal alleged to have been stolen was branded—; that the State introduced a bill of sale from appellant to W. E. Moore to three head of cattle, the bill of sale showing the brand to be—. Mr. Moore was dead, but his son testified that appellant gave this bill to his father; that he helped kill one of the animals purchased by his father from appellant, and that the hide exhibited in evidence was the hide of the animal purchased by his father from appellant, and which he, the witness, assisted in killing. This hide was identified by the owner as the hide of one of the animals stolen from him. Under the circumstances the court did not err in refusing the special charge requested by appellant that if the jury believed that the animal described in this indictment was one of the animals described in the bill of sale, to acquit the defendant. The indictment charged theft of an animal from Jno. S. Thompson; the hide of the animal found in Mr. Moore's possession was branded — and his son testified this animal was sold by appellant to his father; Mr. Thompson positively identifies this hide as the hide of one of the animals he lost.

Appellant moves for a new trial on the ground that one of the jurors, T. M. White, had formed and expressed an opinion prior to the time he was accepted on the jury. That he had said in the presence of two gentlemen, "that he had heard all the evidence in the case, and that under the evidence the jury was bound to send him off." The State controverts this ground, and files an affidavit of Mr. White "that he had never heard the testimony in this case against appellant, but he did hear the evidence in the other case against appellant, wherein he was charged with stealing another and different animal, and if he made the remark alleged he referred to the testimony in the other case against appellant. In addition to this it is shown that while the jury was being empaneled in the other case at the former trial, White was present and said: "I wish I could help cut that jury; I know I could

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cut one that would acquit him, and if I could just get on it as a leader, you would have no trouble at all,'' and then told the attorney who he thought would acquit the appellant in that case. Those facts were communicated to appellant's counsel prior to the time White was selected on the jury in this case, and with the knowledge of these facts he was accepted. Under such circumstances it is too late to complain that this man was on the jury, in the motion for new trial.

The only other ground in the motion shows that after the jury retired, the fact that appellant had not testified was referred to, and this prior to the time the jury had arrived at a verdict. But it is also shown that when the matter was referred to, the foreman of the jury at once informed the jury that this could not be discussed nor considered by them, and there was no further reference to the matter. It has always been the rule in this court that a mere incidental reference to the failure of defendant to testify will not be cause for reversal of a case. In this case the evidence showing, beyond question, the guilt of appellant, and the jury assessing the lowest penalty, these grounds present no question for which we would feel called upon to reverse the case.

The judgment is affirmed.

Affirmed.

Blue Jay Robinson v. State.

No. 2333. Decided March 5, 1913.

1.—Local Option—Indictment—Law in Force—Date of Offense.

Where the indictment alleged, without giving the date, that the prohibition law was put in force by election, orders, etc., prior to the time the act making it a felony was passed, the same was sufficient. Following James v. State, 63 Texas Crim. Rep., 75.

2.—Same—Insufficiency of the Evidence—Law in Force.

In the absence of proof that the prohibition law was in force in the county of the prosecution, the conviction cannot be sustained.

3.—Same—Judicial Knowledge—Local Option Law.

Courts cannot judicially know that prohibition is in force in any given locality in this State; it is, therefore, always necessary to make this proof.

4.—Same—Charge of Court—Law in Force—Contest.

Where a local option election is not contested within the time specified by law, it becomes effective as a matter of law and when the proof is made that the election has been held, etc., the court can charge as a matter of law that prohibition is in force.

Appeal from the County Court of Sabine. Tried below before the Hon. T. R. Smith.

Appeal from a conviction of a violation of the local option law; penalty, a fine of $25 and twenty days confinement in the county jail.

The opinion states the case.

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J. W. Minton, for appellant.—On question of proof that prohibition is in force: Ellis v. State, 59 Texas Crim. Rep., 626, 130 S. W. Rep., 170; Morton v. State, 37 Texas Crim. Rep., 131.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—Appellant was convicted for unlawfully selling intoxicating liquor under the first part of Article 579, Penal Code, making it a misdemeanor and fined $25 and twenty days in jail.

Appellant claims the indictment is invalid because it does not allege the specific date on which prohibition was put in force in Sabine County, it alleging, however, without giving the date, that the prohibition law was put in force by election, orders, etc., prior to the time the Act making it a felony was passed. The indictment, in our opinion, is sufficient. James v. The State, 63 Texas Crim. Rep., 75.

No evidence whatever was introduced on the trial, of the various orders of election declaring the result, publication and the order making prohibition effective. In other words, there was no proof at all introduced on the trial that prohibition was in force in Sabine County, nor when nor how put in force. The point was clearly made in various ways by the appellant in the lower court and in this. This court has many times and uniformly held that it does not and can not judicially know that prohibition is in force in any given locality in this State, nor can any of the lower courts have such judicial knowledge. It is, therefore, always necessary to make this proof. When the proof is made by the introduction of the proper orders, etc., then, under the law, as it now is, the court can charge as a matter of law that prohibition is in force, but it can not do so in any case, unless such proof is made. The reason it can so charge when the proof is made is because, under the law as it now is, where an election resulting in prohibition has been carried and it has not been contested within the time specified, it becomes effective as a matter of law, and does not have to be found as a fact by the jury. The failure to make this proof necessarily results in a reversal of the judgment.

The judgment is reversed and the cause remanded.

Reversed and remanded.

FELIX JONES V. STATE.

No. 2299. Decided March 5, 1913.

1.—Theft—Impeaching Testimony—Charge of Court.

Where the testimony of the State was purely impeaching in its character and not admissible as original testimony, or as testimony upon which the conviction could be predicated, it should have been limited in the court's charge, and a failure to do so was reversible error. Following Henderson v. State, 58 Texas Crim. Rep., 581, and other cases.

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2.—Same—Evidence—Impeaching Own Witness—Charge of Court.

Where a State's witness had failed to identify the defendant except in a very indefinite way, and the State laid a predicate to impeach him and introduced another witness who testified that the first witness had identified the defendant, the court's failure to limit said testimony to purposes of impeachment was reversible error. Following Dusek v. State, 48 Texas Crim. Rep., 519, and other cases.

3.—Same—Charge of Court—Original Taking—Receiving Stolen Property.

Where, upon trial of theft, there was evidence that the defendant purchased the alleged stolen property, he could not be guilty as principal, although he may have actually known that the property was stolen, and the court's failure to charge upon the issue of purchase was reversible error.

Appeal from the District Court of Tom Green. Tried below before the Hon. J. W. Timmins.

Appeal from a conviction of theft; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Cunningham & Oliver and *Anderson & Dumas,* for appellant.—On question of the court's failure to limit testimony of impeachment: Dusek v. State, 48 Texas Crim. Rep., 519, and cases cited in opinion.

On question of court's failure to limit impeaching testimony: Keath v. State, 50 Texas Crim. Rep., 63, and cases cited in opinions.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was convicted for the theft of diamonds. These diamonds were supposed to have been in the safe belonging to Leffel. The safe was in the house belonging to the alleged owner, and was entered and the safe opened which contained the diamonds. So far as the appearance of the building and safe were concerned there had been no breaking. The theory upon which the State prosecuted the case was that some one who had a key to the house entered it by unlocking, and after going out relocking, the door. It is also the contention of the State that whoever entered the safe had the combination to the safe, and after entering it, relocked it. This is a case of circumstantial evidence. It was necessary in the case, as thought by the State, and perhaps correctly, to show that whoever entered the house and the safe did it as above indicated. Of course, it then became necessary in order to convict appellant that he must enter both the house and the safe, or was a principal to the transaction, otherwise he could not be guilty of the theft of the diamonds. The main reliance of the State was the real or supposed possession by appellant of the diamonds. Appellant had a couple of diamonds that were sought to be identified as those that came out of the safe. There was another diamond a little peculiar in that it was yellow and had a flaw or crack in it. It was sought to connect defendant with the possession and sale of this diamond. There is no evidence, or if any at all so very slight it amounts to nothing, that appellant had a key to the house or combination to the lock of the

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safe. Appellant placed the witness Newman on the stand as a witness. Upon cross-examination of this witness the State laid the predicate for impeachment by asking him, in substance, if he did not upon a certain occasion lend appellant a pair of pants in which was a piece of paper containing the number of the combination to the safe from which the diamonds were taken. He admitted lending appellant the pants because those of appellant had been torn, the pants to be used by appellant until his could be repaired, but he denied that there was any paper in the pants on which was written a combination to the safe. The State then, to contradict the witness Newman, introduced some witnesses, who testified that appellant had made the statement to them that the paper with the combination on it was in the pants at the time he, Newman, loaned the pants to appellant. Being purely impeaching and not admissible as original testimony, or as testimony upon which the conviction could be predicated, it should have been limited in the charge, and this by all the authorities. The court did not so limit the evidence, and appellant reserved his exception both by a bill and in motion for new trial. This was a most damaging fact and could be used by the jury, and doubtless was so used as evidence of the fact that the paper was in the pants of Newman when worn by appellant. If the paper was in the pants worn by appellant, and appellant obtained the paper with the combination to the safe on it, it would have been a very strong circumstance in the case, indicating that appellant may have entered the safe. The witness Newman, it seems, also had a key to the house; that he was one of the employes. The exception of appellant to the failure of the court to charge this was well taken, and the court committed error of a reversible nature in not instructing the jury in regard to this phase of the case. See Branch's Criminal Law, sec. 873. Mr. Branch states the rule tersely in the following language: "Proof of contradictory statements offered by the State to impeach a witness, where the same could be used by the jury to establish any fact in the case other than as affecting the credibility of the witness, should be limited in the charge," citing a great number of authorities. One of the latest cases decided by this court upon this proposition is Henderson v. State, 58 Texas Crim. Rep., 581. See Branch v. State, 15 Texas Crim. App., 102; Rogers v. State, 26 Texas Crim. App., 431; Drake v. State, 25 Texas Crim. App., 293; Washington v. State, 17 Texas Crim. App., 204; Foster v. State, 28 Texas Crim. App., 50; Keith v. State, 50 Texas Crim. Rep., 63; Vanhouser v. State, 52 Texas Crim. Rep., 572; Benjamin v. State, 57 Texas Crim. Rep., 291; Rowan v. State, 57 Texas Crim. Rep., 625; Paris v. State, 35 Texas Crim. Rep., 82; Dusek v. State, 48 Texas Crim. Rep. 519; Martin v. State, 36 Texas Crim. Rep., 125. These are a sufficient number of cases to cite without going further into the list. There are a great number of additional cases not here cited. Mr. Branch has collated many of these in his excellent work on Criminal Law.

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The witness Goodman was used by the State. On his failure to identify appellant on the trial with any degree of definiteness, the State laid a predicate to impeach him, although he was the State's witness. McNamara was placed on the stand to testify and did, to matters denied by the witness Goodman in the predicate laid or sought to be laid to certain things which were contradictory of Goodman's answers to the original question put by the State. Among other things, the witness McNamara testified: "I was present when Mr. Goodman went to Felix Jones to identify him. I went after Mr. Goodman. Yes, Goodman said something to Jones. Goodman and I walked to the justice court room and asked him to identify the man with whom he made the trade a few days before. The justice of the peace, Mr. Jones and his lawyer and another man were there. Goodman looked them over and said Jones was the man, and he asked him what he had done with his watch and money. No, sir, he did not point out and identify Jones' lawyer as the man." He further testified: "I asked Goodman if the man was in there and he said yes, and looked at Jones and said what did you do with my money and watch; he address this to Jones. I was standing in the door of the office and Goodman was on the inside. Yes, sir, I had arrested Jones. That was in July, 1910." Further explanatory of this it will be necessary to state that Goodman had bought a diamond supposed to be the yellow diamond with a flaw in it that was claimed by Leffel as one of the stolen jewels. The man who sold the diamond to Goodman signed a bill of sale to it under the name of Dick Brooks. Goodman gave in exchange for the diamond a watch and some money. Without going further into details we think this is enough of the evidence to show sufficiently the conditions surrounding the impeachment of Goodman by McNamara. This was very important testimony if it could have been introduced as original evidence. Goodman had failed to identify appellant except in a very indefinite way. McNamara's testimony was to the effect that Goodman had identified him in Waco when he was arrested and he was then before the examining court or magistrate. If Goodman had recognized Jones upon the witness stand in this case as being the man who sold him the diamond, it would place the case in a very different light before the jury from what his testimony actually given placed appellant. He failed to do it and left the matter, to say the least of it, in a doubtful condition, if not more than in a doubtful condition. McNamara's statement as to what Goodman did and his identification of it put a very different light upon this phase of the case before the jury. If this could have been used as original evidence in identifying the defendant, the State's case would have been wonderfully strengthened. Not being admissible as original testimony, it could only be used to impeach Goodman, and under the facts of this case only upon the theory that the State was surprised at Goodman's testimony. Exception was reserved to the court's failure to limit this evidence. This was error. Again referring

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to Mr. Branch's work on Criminal Law, sec. 873, he thus tersely states the rule: "If the State impeaches her own witness by proof of contradictory statements, and the same could be used by the jury to establish any fact in the case other than the credibility of the witness, such proof should be limited in the charge." He cites quite a number of cases in support of this proposition, coming down to and including Finley v. State, 47 S. W. Rep., 1015, and Sapp. v. State, 77 S. W. Rep., 457. To the same effect might be cited a great number of cases, among, them: Dusek v. State, 48 Texas Crim. Rep., 519; Drake v. State, 25 Texas Crim. App., 293; Foster v. State, 28 Texas Crim. App., 50; Exon v. State, 33 Texas Crim. Rep., 461; Paris v. State, 35 Texas Crim. Rep., 82; Wilson v. State, 37 Texas Crim. Rep., 373; Winfrey v. State, 41 Texas Crim. Rep., 538; Wooley v. State, S. W. Rep., 1051; Keith v. State, 50 Texas Crim. Rep., 63; Vanhouser v. State, 52 Texas Crim. Rep., 572. It is useless, however, to multiply the cases. It is the unbroken rule in Texas. The charge was in this respect fatally erroneous. It is necessary to reverse this judgment on both of the propositions above stated.

There is another question we might mention in a general way. The testimony in the case is circumstantial, and of not very strong probative force. The court submitted the case upon the theory that there were three stolen diamonds, and instructed the jury that if appellant fraudulently took the diamonds or either of them described in the indictment, and that the diamond or diamonds was the property of Leffel, etc., they would convict. In this connection the court also charged the jury as follows: "You are further instructed that if the defendant purchased the two diamonds delivered to Scott (if they were delivered to him) from one Dooley then you will not consider said two diamonds in passing upon the guilt of defendant." The third diamond relied upon by the State was the yellow diamond with a flaw in its discussed in the second paragraph of this opinion. Appellant asked a special instruction to the effect that if the jury should find that defendant bought the diamonds claimed to have been sold by Scott to the witness Fred, which was an unmounted diamond, then they should acquit. The court's charge is not sufficient, nor do we believe that the special charge asked by appellant presents appropriately the question. Exceptions were reserved, however, to all these matters, not only as to these charges, but that the court was wrong in submitting the matter. We would suggest upon another trial, that if appellant bought two of the diamonds, that the court should instruct the jury that so far as they are concerned the appellant should be acquitted, or if they had a reasonable doubt of the purchase of those diamonds he should be acquitted. In other words, appellant could not be convicted unless he was a principal in the transaction of the theft, and if he purchased either or all of the diamonds after their theft, he could not be guilty as a principal, although he may have actually known they were stolen. Under the evidence in the case the law

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should be so given that appellant should not be convicted of the theft of any of the diamonds unless he was shown to have been guilty of the theft of that diamond. Not only should the theory of purchase be given in charge to the jury upon another trial, but reasonable doubt should be given in the same connection. The case is one, to say the least of it, based upon very weak evidence.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

J. D. MANLEY v. STATE.

No. 2218. Decided March 5, 1913.

1.—Murder—Continuance—Want of Diligence.

Where defendant's fourth application for a continuance showed that some of the alleged absent witnesses appeared and testified; that the diligence as to others was insufficient, and those, where due diligence had been used, could only testify to cumulative facts, there was no error in overruling same.

2.—Same—Jurisdiction—National Guard.

The Act under which the State Militia, termed National Guard, is organized provides that the State courts shall have jurisdiction of offenses committed by militia men; besides, this is the law exclusive of this statute, in times of peace, and where the District Court first obtained jurisdiction, the same attached throughout.

3.—Same—Evidence—Dying Declarations—Predicate.

Where the proper predicate was laid and the dying declarations based thereon were admitted, there was no error; and even that part of deceased's declarations which the court, on a former appeal, held to be inadmissible, and which was not in fact admitted, was admissible. Following Pierson v. State, 18 Texas Crim. App., 524, and other cases.

4.—Same—Evidence—National Guard.

Where it was admitted by the State that the call for the militia was regular and made by proper authority, and that defendant was legally at the place where the difficulty occurred, there was no error in excluding other testimony of this character.

5.—Same—Requested Charges—Manslaughter—Adequate Cause.

Where all the requested charges on manslaughter were covered by the court's main charge, except two, which were not the law of the case on adequate cause, there was no error; besides, the court properly submitted the issue of manslaughter.

6.—Same—Self-Defense—Accidental Killing—Negligent Homicide.

Where, upon trial of murder, the court properly submitted self-defense and accidental homicide, as raised by the evidence, and the issue of negligent homicide was not raised by the evidence, there was no error in the court's failure to submit the latter.

7.—Same—Charge as a Whole—Sufficiency of the Evidence.

Where, upon trial of murder, the defendant was convicted of murder in the second degree which was sustained by the evidence under a proper charge of the court, when considered as a whole, there was no error.

Appeal from the District Court of Ellis. Tried below before the Hon. F. L. Hawkins.

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Appeal from a conviction of murder in the second degree; penalty, forty years imprisonment in the penitentiary.

The opinion states the case.

Will Hancock and *Albert Walker* and *J. C. Muse*, for appellant.—On question of the court's charge on manslaughter: Gilcrease v. State, 33 Texas Crim. Rep., 619; Rice v. State, 51 id, 255; Brown v. State, 54 Texas Crim. Rep., 121, 112 S. W. Rep., 80; Huddleston, v. State, 54 Texas Crim. Rep., 93, 112 S. W. Rep., 64; Snowberger v. State, 58 Texas Crim. Rep., 530, 126 S. W. Rep., 884; Coffin v. U. S., 156 U. S., 432; Eanes v. State, 10 Texas Crim. App., 421.

On question of imperfect self-defense and manslaughter: Lankster v. State, 56 S. W. Rep., 65.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant in this case was convicted of murder in the second degree and his punishment assessed at forty years confinement in the State penitentiary.

This is the second appeal, the opinion of the court on the former appeal being reported in 62 Texas Crim. Rep., 392.

It appears that the militia, acting under the direction of its superior officers had roped or wired off a portion of certain streets in the City of Dallas near the Fair Grounds, on the occasion of President Taft's visit, and the militia were given instructions to prevent any persons from entering the grounds so fenced off. Appellant was placed along this line, guarding a certain section of it. The State's testimony would show that deceased and a companion approached the wire and asked permission to cross, in order to catch a street car. Appellant refused them permission, when deceased called his attention to the fact that others were crossing, and insisted on being permitted to do so. Appellant replied he wanted "none of his lip" and struck deceased on the shoulder with his gun, knocking his hat off. Deceased remarked something about this being a nice or pretty way for a soldier to act, stooping at the time to pick up his hat, when appellant plunged his bayonet clean through his body, inflicting a death wound. Appellant, in his testimony, would have deceased cursing and attempting to force his way across the inclosure when he struck him, and he says he then brought his gun to a "charge bayonet position," when, it becoming intangled on the wire, he attempted to get it loose, and in the effort to do so, deceased was pushed or in some way was forced on the bayonet, and the killing was unintentional and accidental. Some witnesses for the appellant would have deceased when he was hit on the shoulder, curse, step back, and throw his hand to his rear pocket, as if to draw a weapon, when appellant inflicted the fatal wound.

The witnesses for the State testify that the gun did not become

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entangled in the wire; that deceased made no demonstration as if to draw a weapon, but when he said that was a nice way for a soldier to act, appellant deliberately plunged the bayonet into him, making a remark, when asked about it immediately thereafter, showing it an intentional act.

The first bill complains of the action of the court in overruling his fourth application for a continuance. The approval of the court shows that two of the witnesses named in the application appeared and testified during the trial, the testimony of a third was reproduced; and as to the other witnesses named, we think the diligence insufficient in the main; and if sufficient as to some, the testimony of those would be but cumulative of that adduced on the trial, and this being the fourth application for a continuance, the court did not err.

The next bill shows that appellant filed a plea alleging that the courts of this State had no jurisdiction of the offense. The act under which the State militia, termed "National Guard," is organized provides that the State Courts shall have jurisdiction of offenses of this character. (See sec. 103 of Article 30.) But, exclusive of this article, when a soldier in time of peace, commits an offense against the laws of a State, the courts of the State in which the offense is committed have jurisdiction of the offense. The offense charged against appellant was a capital offense; the courts of this State first obtained jurisdiction and under no theory of the law could it be deprived of that jurisdiction. The case relied on by appellant must be that of Grafton v. United States, 206 U. S., 348, but even that case holds that in the character of case charged against appellant, the District Courts of this State would have exclusive jurisdiction, having first obtained jurisdiction.

The appellant objected to what was claimed was the dying declaration of deceased being introduced in evidence, and under such circumstances there was no error in the court permitting evidence to be introduced to show that he, by his acts, words and conduct demonstrated that he was sane, in full possession of his mental faculties, and knew and appreciated the fact that he was in a dying condition, and entertained no hope of recovery. Neither was there error in admitting the statement in evidence. It reads:

"St. Paul Sanitarium, Dallas, Texas, October 23, 1909.

"I, Louis Reichenstein, now realizing that I am probably at the point of death, declare that I was stabbed by one of the soldiers at the Fair Grounds today. * * * I asked the soldier to permit me to cross the line to catch a car, and he refused me and struck me across the right shoulder with his gun. I made the remark to him then: 'Wasn't that a nice thing to do,' and thereupon without word or warning he ran his bayonet right through me.

(Signed) "L. Reichenstein."

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The court excluded that portion of the statement which this court held was inadmissible on the former appeal. The only error, if error there be, was in following the opinion of the court and excluding that part which was excluded. It is true that we held on the former appeal, it should not have been admitted, and this is still the writer's individual opinion, but there are many cases that hold that the expression used was but a short-hand rendition of the facts and was admissible. Pierson v. State, 18 Texas Crim. App., 524; Roberts v. The State, 5 Texas Crim. App., 141; Sims v. The State, 36 Texas Crim. Rep., 154. Many other cases might be cited, but these evidence there was no error in admitting that portion of the statement which was admitted in evidence.

There was no error in excluding that portion of the evidence of the witness S. E. Moss, which was excluded. It was admitted by the State, as shown by the court in his approval of the bill, and the evidence that the call for the militia was regular and made by proper authority, and appellant was legally at the place where the difficulty occurred; therefore the testimony offered could have served no useful purpose.

Appellant requested many special charges, but they were all covered by the court's main charge except two, and in those two he sought to have the court instruct the jury that if deceased intended to enter the inclosure guarded by defendant, or it so appeared to the dendant, and the defendant intentionally thrust him with the bayonet and killed him, his offense would be manslaughter. This is not the law, and the court did not err in refusing the charges presenting that theory. It takes both adequate cause and sudden passion, etc., to reduce an offense to the grade of manslaughter.

The court in his charge submitted manslaughter and did so in an appropriate charge under the evidence in this case. Every phase of the evidence which could raise this issue was presented in an admirable way, and the criticisms of the charge in this respect are without merit.

Self-defense was also properly presented to the jury for their consideration and determination in a most favorable light. After submitting self-defense in accordance with the testimony, the court also charged the jury on the law of accidental homicide, telling them:

"If you should find and believe from the evidence that the deceased L. Reichenstein came to his death because of a bayonet wound inflicted by a bayonet upon a gun in the hands of the defendant, yet if said killing was unintentional and accidental so far as this defendant was concerned, the same would not constitute any violation of the law and the defendant could not be punished therefor. I therefore instruct you that (a) If the defendant Manley placed or thrust his bayonet in front of himself or over, upon or across the wire of the inclosure, and the deceased ran against said bayonet or precipitated himself accidentally or intentionally against said bayonet, and the

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wound was inflicted in this manner, and if he died therefrom, this would be accidental homicide; (b) if Manley placed or thrust his gun on the wire of the inclosure, and his gun caught on the wire, and in extricating or removing, or attempting to extricate or remove the same from the wire, the deceased was unintentionally wounded by the bayonet, and died from such wound, this would be accidental homicide; (c) if defendant Manley, in the performance of his duties, had presented his bayonet in front of himself, or had placed or thrust his gun above, over or across the wire of said inclosure, and the deceased was pushed against the said bayonet by other persons and was accidentally wounded by said bayonet on said gun, and died from such wound, then the killing would be accidental homicide; (d) if in any manner the deceased was accidentally injured by the bayonet upon the gun of the defendant, either by the act of the defendant or by the deceased or other persons, but the same was accidentally done and without any intention on the part of the defendant to kill or seriously injure the deceased, then such killing would be accidental homicide. Hence, you are instructed that although you may find that the defendant Reichenstein came to his death from being thrust through with a bayonet upon a gun in the hands of the defendant, yet if the said wound was inflicted under any of the circumstances above set forth, or if you have a reasonable doubt thereof, and the deceased died therefrom, then this would be accidental homicide and you will acquit the defendant."

The evidence raised the issue of accidental homicide and not negligent homicide. Under no phase of the testimony would the conditions arise which would call for a charge on negligent homicide of either the first or second degree.

We have carefully examined each ground in the motion for new trial, and while appellant picks out here and there a paragraph or sentence and criticizes same, yet when the whole paragraph and charge is read, it is readily seen there is no ground upon which to base the criticism. Every phase of the law was presented, and the judgment is affirmed.

Affirmed.

J. B. SALMON V. STATE.

No. 2052. Decided March 5, 1913.

1.—Murder—Statement of Facts—Practice on Appeal.

A statement of facts containing two hundred and forty typewritten pages is unnecessarily voluminous, and should have been condensed.

2.—Same—Verdict—Affidavits—Verdict by Lot.

Where the motion for new trial contended that the verdict of the jury was reached by lot, but was not supported by affidavit, the same need not be considered; besides, there was no error in overruling it. Following Pruitt v. State, 30 Texas Crim. App., 156, and other cases.

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3.—Same—Evidence—Self-Serving Declarations.

Upon trial of murder, there was no error in excluding the self-serving declarations of defendant which had no connection with the killing.

4.—Same—Evidence—Ill Will—Declaration of Deceased.

Where, upon trial of murder, there was no contest about the fact that hostility and ill-will existed between defendant and deceased for some time before the killing, there was no error in refusing further testimony as to what a witness understood the deceased referred to in a conversation with the witness about a certain street which defendant was to clear and clean up.

5.—Same—Evidence—Ill Will—Acts of Deceased.

Upon trial of murder, where the fact that ill will existed between defendant and deceased was not disputed, there was no error in excluding testimony with reference to conduct of deceased towards a third party showing that deceased had a pistol at his residence.

6.—Same—Map—Evidence—Dedication of Street.

Where the dedication of a certain street had nothing to do with the facts concerning the homicide and this matter had been fully explained by other testimony, there was no error in refusing to admit in evidence a certain map to show the dedication of this street.

7.—Same—Charge of Court—Self-defense.

It is better practice, in submitting an issue to the jury, to apply the charge of the court to the evidence, instead of submitting the matter in a general way, and where the court followed this practice, there was no error.

8.—Same—Charge of Court—Manslaughter.

Where, upon trial of murder, the court's charge on manslaughter was strictly applicable to the facts in evidence, there was no error.

9.—Same—Charge of Court—Uncommunicated Threats.

Where, upon trial of murder, the evidence did not raise the issue of uncommunicated threats, there was no error in the court's failure to charge thereon.

10.—Same—Charge of Court—Communicated Threats.

Where, upon trial of murder, the evidence clearly established that the threats by deceased and communicated to the defendant were in fact made, there was no error in the court's charge in failing to instruct the jury that the defendant could act upon such threats, whether they were made or not; the defendant not asking any charge thereon.

Appeal from the District Court of Coleman. Tried below before the Hon. Jno. W. Goodwin.

Appeal from conviction of murder in the second degree; penalty, twenty years imprisonment in the penitentiary.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, and *Snodgrass & Dibrell,* for the State.—On the question of verdict by lot: McAnally v. State, 57 S. W. Rep., 832, and cases cited in opinion.

On question of court's charge on communicated threats: Pena v. State, 38 Texas Crim. Rep., 333; Sue v. State, 52 id., 122; Jones v. State, 53 id., 131; Keye v. State, 53 id., 320; Schaper v. State, 57 id., 201; Allen v. State, 45 id., 468; Bird v. State, 48 id., 188; God-

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win v. State, 39 id., 404; Garello v. State, 31 id., 56; Bogan v. State, 30 Texas Crim. App., 466; Bishop v. State, 43 Texas, 390.

PRENDERGAST, JUDGE.—Appellant appeals from a conviction for murder in the second degree with a penalty of twenty years in the penitentiary assessed.

The statement of facts has about 240 typewritten pages. It is unnecessarily voluminous. It could and should have been contained in less than one-fourth the number of pages. Yet, while so voluminous, we have read and studied it all thoroughly. There are but few questions in the case necessary to be decided.

The killing of Dr. McCord, the deceased, by Dr. Salmon, the appellant, occurred on March 30, 1911, in the small unincorporated town of Christoval in Tom Green County, where he was indicted. The venue was properly changed to Coleman County, where this trial occurred.

Dr. Salmon was a practicing physician and had lived at Christoval for many years. Something like four years before the killing Dr. McCord, the deceased, who was also a practicing physician, moved to, and located at Christoval. Not a great while after Dr. McCord located there, ill-feeling was aroused between them, which grew worse and to such an extent that Dr. Salmon himself testified they had not spoken for some year and a half to two years before the killing. The whole record is full of the fact that ill-feeling existed and had existed for a long time, each against the other, and that this continued with more or less intensity up to the very time of the killing. These parties lived on the same block and their places fronted the same street. Appellant lived on the southwest corner of the block, his premises lying along side of the main street of the town; the deceased on the southeast corner of the block with only one residence between them. Their offices were on the same street some few blocks from their residences, not a great way apart, fronting opposite sides of the main street. It was altogether proper, if not necessary, for the deceased, in going back and forth from his office to his residence, to pass in front of and around the appellant's and frequently did so during all these years. There was testimony that before the killing, appellant had made specific and direct threats to the effect that he would kill the deceased. There was some testimony to the effect that the deceased made some conditional, or what might be construed to be, threats against appellant. The testimony clearly shows that whatever threats, or conditional threats, deceased is shown to have made against appellant were long before the killing, communicated to, and known by, him. There is no testimony showing that deceased had made any recent threat against appellant shortly prior to the killing. The testimony unquestionably shows that for some time after the threats or supposed threats were made by deceased against appellant and his knowledge of them, they met at

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many different places, in the country repeatedly, and from day to day, and frequently several times during the same day, in said town, and that they met and passed on the streets and in and about the business houses of said town. At no time and in no way does the evidence show that either ever attempted to execute his threats, or supposed threats, unless it be at the very time and place of the killing.

Some six months before the killing, the evidence shows, that the citizens of the town organized a club which had the object of cleaning up the streets, and improving the town for general purposes, and that appellant was one of a committee of five whose business and duty it was to do this. Among other streets that this committee undertook to clean up and work was one that was claimed to be along the east side of Dr. McCord's place in which, and along about the sidewalks of which, were some pecan and probably other trees. This committee claimed that there was a street along the east side of Dr. McCord's premises. He denied this. Whether the street or the ground adjoining Dr. McCord's premises on the east was a street or not, was wholly immaterial in this case. Whether it was a street, and dedicated as such or not, could not, and did not, have had any material effect upon and no immediate connection with the killing. It might be conceded that it was or it was not, and it would not have effected this case. The whole and only effect it could and did have was to emphasize the fact of the hostility of Dr. McCord toward Dr. Salmon on the one hand, and the hostility of Dr. Salmon against Dr. McCord on the other hand. But, as stated above, if there was any one fact, beyond doubt established in this case, it was, that there was a state of ill-feeling and hostility by these parties each towards the other.

The testimony clearly shows that an hour or two before the killing deceased had left his horse at the blacksmith shop to be shod, which was almost directly across the street from appellant's residence. Appellant knew deceased's horse. Shortly before the killing appellant went across the street from his residence to the printing office, which was also diagonally across the street from his residence and within a very short distance of the blacksmith shop. Both were in full view from his residence and from the whole of the way going across from his residence to the printing office. The next house, going up the street toward appellant's office and also that of deceased, was a hotel, which was back some fifteen or twenty feet from the fence surrounding the hotel. The deceased, shortly before the killing, had left his office which fronted said main street, had gotten on the sidewalk on the opposite side, was in his shirt sleeves and going down the side of the street next to the hotel, ostensibly to get his horse from the blacksmith shop. The distance from his office to the hotel was much greater than from the printing office to the hotel. The appellant and the deceased met on the sidewalk, not exactly in front

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of the hotel, but nearly so. Besides appellant there were four witnesses to the killing. All of the witnesses other than appellant were disinterested and no kin to either party. Each of these witnesses was at a different direction from the killing and each saw it from a different viewpoint. One witness, Custos Hanan, testified he was sitting on the front gallery of this hotel and saw appellant pass the immediate front thereof. He also saw the deceased going down the same side of the street and saw these parties when they met and the killing occurred. In substance he testified that he saw the parties when they met; that Dr. Salmon said, "You son-of-a-bitch, when you meet me walk around me," and slapped Dr. McCord in the face; "Dr. McCord then kinder stepped back and threw up his hand and then Dr. Salmon shot him; Dr. Salmon shot him twice, and he fell, and he shot him again." All the shots were very close together. Dr. Salmon shot the first time immediately after Dr. McCord threw up his hand and Dr. McCord kinder threw his hand out and grabbed at Salmon's, and he fell when the second shot was fired. Mrs. Hill, who was across the street on the opposite side of the hotel about a hundred yards from the killing, said she was out on her front gallery and while she did not see the parties at the immediate time the first shot was fired, that it attracted her attention and she immediately looked and saw what the parties were doing and the other two shots. She confirms the witness Hanan substantially in every respect. Mr. Welch, another witness, was in the printing shop on the same side of the street of the hotel. He did not see, but heard the first shot, and immediately went to where he could see the parties and did see them and saw everything that occurred between them after the first shot and his testimony substantially confirmed that of Hannan and Mrs. Hill. Mrs. Wilson was across the street from the killing, in her residence, heard the first shot, immediately looked and saw the other two shots and all that occurred and what the parties did, after the first shot was fired. She also substantially confirms the other witnesses. All of these witnesses say in substance that there was no clinching between the parties; that the deceased did not jerk down or otherwise get the appellant upon the ground at any time, and in fact in every way they all dispute the testimony of the appellant as to how the immediate killing occurred. The testimony by all the witnesses, without controversy, shows that appellant's first shot struck the deceased from the front in the stomach, going entirely through the body; that as the deceased began to fall, stagger or stoop over from the effect of this first shot, his body somewhat approached that of the appellant and that appellant then put his open hand up against the body of the deceased and shot him the second shot through the heart, the ball going entirely through the body and the ball also piercing appellant's hand from the back; that after the deceased had fallen and was lying prostrate on the ground, appellant fired the third shot in the top of his head, the ball going

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straight into the head from a little to one side and emerging to the skin back of and just below one of his ears. Deceased was wholly unarmed. All of these State's witnesses show that the appellant and deceased were in the act of passing, or just before they passed, each being to the right of the other, which would put appellant on the outside from the fence and the deceased inside nearest to the fence around the hotel.

Appellant, in his testimony, claimed as he was meeting deceased he bore to the left to pass between him and the fence and that deceased passed him on his (appellant's) right side; that just as, or after, they thus met and passed, deceased whirled, threw out his hand and caught appellant in the collar and jerked him forward and down on the ground; that as deceased jerked him down it exposed his automatic pistol in his hip pocket, and that they both then grabbed for his pistol, deceased getting hold of the handle and he getting it around the guard and trigger, each trying to wrest the pistol from the other, and that while in this condition the shooting and killing occurred. He could neither tell on direct, or cross-examination any of the details of the position of himself or deceased at any time during the shots and he could not explain and did not attempt to explain how it was, or the position that he or deceased either was in at the time he first shot him in front in the stomach entirely through the body, the second time in front through the heart entirely through the body and the third time in the top of the head as described. He claimed that he did not know and could not explain, and would not undertake to explain.

Appellant contends, in his motion for new trial, that the verdict of the jury was reached by lot. This motion is not sworn to, and is in no way supported by any affidavit. Under such circumstances the court did not have to consider it. But the court did consider it, and the record shows, heard evidence on it. The evidence on this point was amply sufficient to justify the court to hold against appellant on it. Pruitt v. State, 30 Texas Crim. App., 156; McAnally v. State, 57 S. W. Rep., 832; Keith v. State, 56 S. W., 628, and many other cases unnecessary to cite.

Appellant complains by a bill that the court refused to permit him to prove by the witness McKee what Dr. Salmon had said in Dr. McCord's hearing in a speech long before the killing. The exact time when this is claimed to have been said is not shown by the bill, but we take it, from the record, it was about six months prior thereto. Clearly the testimony excluded was a self-serving declaration by the appellant. It was too remote from the time of the killing, and is in no way shown to have had anything to do with the killing or any influence on anything in connection therewith.

Neither did the court err in refusing to permit the witness Standifer to testify that he understood the deceased to refer to Dr. Salmon, when, in discussing with Dr. McCord about the opening of said street,

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deceased said that when they put a gentleman on that street committee he would listen to them. The court permitted this witness to testify fully what was said between the witness and Dr. McCord at the time, and his statement that he understood the deceased was referring to Dr. Salmon was merely his opinion. We take it that from the whole testimony of this witness, giving the details of what was said, it was shown that he had reference to Dr. Salmon and no one else, and his merely further testifying that he understood Dr. McCord referred to Dr. Salmon, could not have added anything to the effect of his testimony. Besides, this testimony could not and would not have effected the result in this case. As stated above, if there was any one thing established in this case it was that a state of hostility existed between Dr. Salmon and Dr. McCord continuously for two years or more before the killing. What we have said on this subject equally applies to appellant's next bill, in which he complains he was not permitted to have the witness Holland tell that he understood witness Duncan was referring to the pistol deceased had at his residence when he run Duncan and others away from his place, and would not let them cut down said trees, in stating "it was the ugliest, meanest old thing I ever saw," some several months before the killing. Besides, the Judge, in qualifying this bill as to the proposed testimony of Holland, clearly shows that no reversible error was committed in not permitting the witness to testify as to what said Duncan meant.

Neither was any error whatever committed, as claimed by two other bills of appellant, wherein in one the court would not permit the map to be introduced for the purpose of showing a dedication of said street and the other to the excluding of a deed. None of these matters could have had any effect upon the trial of this case. The bills and record show that the court permitted the widest scope of inquiry about this street and the deeds thereto and thereabouts, and permitted the map to be introduced for every other purpose, and the deed to be testified about orally. The exclusion of this evidence could in no possible way have effected the result of this case.

In his motion for new trial appellant attacks the charge of the court submitting his claimed defense on self-defense to the jury, in that it is too restrictive and inapplicable to the facts, and he claims that on this point the charge should have been general. It is the better practice, and has uniformly been so held by this court, that in submitting an issue for a finding, for the court to apply the charge of the law to the evidence in the case. After carefully reviewing the evidence in this case on this point, which was solely that of appellant himself, it is our opinion that the court correctly and aptly submitted his claimed self-defense, and that said charge is not subject to the attack made. In our opinion the court correctly submitted self-defense in every phase as favorably to appellant as the evidence and the law would justify.

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The charge of the court on manslaughter is strictly in accordance with the statute and applicable to the testimony in this case, and is not subject to the criticism made thereon by appellant.

Appellant in his motion for new trial, in a very general way, complains that the court failed to charge upon uncommunicated threats and to tell the jury the effect thereof. He in no way, by this ground of his motion or otherwise, points out any threat or supposed threat that was ever made by deceased against appellant which was not communicated to him. We have diligently sought, in a careful reading and consideration and reconsideration of the evidence on this point, to find any such threat, and have failed to find any. It was clearly shown, and the appellant himself testified, that all of the supposed threats or conditional threats ever made by the deceased against appellant were communicated to and known by him long before the killing.

Again, appellant claims that the charge of the court on communicated threats was erroneous in that it required the jury to believe that such threats were made; whereas, he contends, that whether they were made or not, if such had been communicated to him, he had the right to act upon them the same as if they had been made.

It is true that the appellant would have had the same right to act where he had been informed that deceased had made threats against him whether, as a matter of fact, deceased had made such threats or not, and the court should have so charged if the evidence raised such issue. The evidence clearly establishes that the threats, or what was claimed to be threats, by the deceased against appellant were actually made. The testimony on this subject was undisputed and clear. There was no controversy about it. The appellant asked no charge whatever on the subject. This being the case, the charge given was all that was necessary.

The judgment is affirmed.

Affirmed.

A. O. CONDRON V. STATE.

No. 2196. Decided March 5, 1913.

Rehearing denied April 2, 1913.

1.—Murder—Charge of Court—Manslaughter.

Where, upon trial of murder, the defendant was convicted of manslaughter, receiving the lowest penalty, the charge on murder need not be considered and that on manslaughter, although slightly inaccurate, was not cause for reversal.

2.—Same—Argument of Counsel.

Where the criticisms of the argument of counsel in the light of the qualifications by the court were untenable, there was no error.

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3.—Same—Charge of Court—Weight of Evidence.

Where the court's charge was but a statement of a proposition of law if the jury found a given state of facts, the same was not on the weight of evidence.

4.—Same—Charge of Court—Carrying Pistol—Officer—Right to Arrest.

Where, upon trial of murder, the evidence showed that shortly before the homicide the defendant had a difficulty with a third party during which he reached for his pistol and fired it, and a warrant was placed in the hands of the deceased who was sheriff and his deputy for the arrest of defendant for carrying a pistol, and who approached him with said warrant to arrest him when the difficulty arose in which deceased was killed by defendant's companion, there was no error in the court's charge that if defendant was unlawfully carrying a pistol that he was subject to arrest by deceased or any of his deputies, and such charge did not assume the fact that the defendant was carrying a pistol and was proper under the law and facts of the case. Article 479, Penal Code. Following Jacobs v. State, 28 Texas Crim. App., 79, and other cases. Davidson, Presiding Judge, dissenting.

5.—Same—Charge of Court—Reasonable Doubt—Charge as a Whole.

Where the court charged that the burden rested on the State to establish the guilt of the defendant beyond a reasonable doubt, etc., or else to acquit him, but if the evidence satisfied the jury beyond a reasonable doubt of the guilt of the defendant, to convict him of that degree of the offense of which he was guilty, this could not mislead the jury that the court believed there was no reasonable doubt as to defendant's guilt, when taken in connection with other portions of the charge that defendant was not only entitled to the benefit of a reasonable doubt on the whole case, but as between the degrees of the homicide committed, and there was no error Distinguishing Comegys v. State, 62 Texas Crim. Rep., 231. Davidson, Presiding Judge, dissenting.

6.—Same—Charge of Court—Manslaughter—Presumption of Innocence—Reasonable Doubt.

The law requires the jury to find the facts affirmatively before they are authorized to convict of any degree of offense, and the doctrine of reasonable doubt need not be appended to each paragraph of the charge of the court if the same as a whole properly instructs the jury on that issue, and where the court not only instructed upon the reasonable doubt on the whole case, but on the different degrees of homicide, the defendant is not denied the presumption of innocence and the benefit of the reasonable doubt.

7.—Same—Charge of Court—Manslaughter—Conflict in Charge—Self-defense.

Where, upon trial of murder, the court submitted a charge on manslaughter as well as one on self-defense, and the evidence showed that the homicide grew out of an attempted arrest by the deceased and his deputy who were sheriffs, and the court correctly drew the line of distinction as to when the acts of deceased in attempting the arrest of defendant would reduce the offense to manslaughter and when such acts would justify the killing in self-defense, there was no conflict in the said two paragraphs of the court's charge as contended by the defendant. Davidson, Presiding Judge, dissenting.

8.—Same—Charge of Court—Presumption of Innocence—Reasonable Doubt.

Where, upon trial of murder, the defendant criticised the court's charge on manslaughter, claiming in one instance that it took away from the defendant the benefit of a reasonable doubt, and in another that it authorized the jury to convict on a preponderance of the evidence; but when the charge, read as a whole, did neither of these things, there was no reversible error.

9.—Same—Charge of Court—Force Used—Manslaughter—Self-defense.

Where the defendant claimed that the court's charge on manslaughter in one instance instructed the jury that if the officers who attempted his arrest, one of whom was deceased, were using greater force than was necessary under the circumstances and this produced adequate cause to render defendant's mind incapable of cool reflection to find him guilty of manslaughter, and in

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another part of the charge, instructed them that if such arrest was made in a wanton manner and the use of greater force than was necessary, the defendant would be justifiable in killing deceased, but when the charge was considered as a whole, no such conflict occurred in the court's charge, there was no reversible error. Davidson, Presiding Judge, dissenting.

10.—Same—Charge of Court—Self-defense.

Where, upon trial of murder, the court's charge on self-defense presented every phase as made by the evidence and when read as a whole, is not subject to any criticisms, there was no reversible error.

Appeal from the District Court of Jones. Tried below before the Hon. Jno. B. Thomas.

Appeal from a conviction of manslaughter; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Cunningham & Oliver and *Ben Reynolds* and *Chapman & Coombes* and *Goodson & Goodson,* for appellant.—On the question of the presumption of innocence and reasonable doubt: Harris v. State, 55 Texas Crim. Rep., 469; Stuart v. State, 57 id., 592; Henderson v. State, 51 Texas Crim. Rep., 193; 101 S. W. Rep., 245; Graham v. State, 61 S. W. Rep., 714; Smith v. State, 9 Texas Crim. App., 150; Robertson v. State, 9 id., 209; Blocker v. State, 9 id., 279; Wallace v. State, 9 id., 299.

On question of reasonable doubt and court's charge of weight of evidence: Comegys v. State, 62 Texas Crim. Rep., 231; Fulkerson v. State, 67 S. W. Rep., 502; Thomas v. State, 56 Texas Crim. Rep., 66; 108 S. W. Rep., 664.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was indicted, charged with murder, and when tried was convicted of manslaughter, and his punishment assessed at two years confinement in the penitentiary.

The record discloses that appellant and deceased were rival candidates for sheriff of Throckmorton County, deceased being elected. The state of feeling between the two men was not friendly subsequent to the election. The State's evidence would disclose that appellant on several occasions made threats as to what he would do under given conditions. It also appears that appellant also bore ill-will towards Mr. Nichols, a deputy sheriff. It also appears that appellant and W. J. Overcash were friends and were together when clashes arose between them and the sheriff or his department, and that Overcash also felt unkindly towards the deceased sheriff. On the evening of the fatal difficulty appellant was at the feed store of W. J. Overcash, and he and Charlie Jones engaged in a war of words. Jones says that appellant asked Overcash, "Where is my pistol," and when Overcash told him where it was, appellant got it and fired, the ball striking near him. R. H. Barnes, who worked at the feed

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store, says the pistol was not kept at the store; that they kept a shotgun there, but no pistol; that he is of the opinion the pistol belonged to Overcash. Appellant testified he asked Overcash, "Where is your pistol," and when Overcash replied he got the pistol, and while handling it let it go off accidentally. The testimony would show that Overcash and Barnes at this time took the pistol from appellant, unloaded it and locked it in a desk drawer.

Jones left the feed store and went before the justice of the peace and swore out a complaint against appellant, charging him with unlawfully carrying a pistol. The justice of the peace issued a warrant for the arrest of appellant and delivered it to the deceased sheriff, Jones telling the sheriff appellant was at Overcash's feed store. He called his deputy, Mr. Nichols, and they started to the store, ostensibly to arrest appellant on the warrant.

While Jones was gone, and after he had gone to the office of the justice of the peace, it is shown that Overcash unlocked the drawer and again loaded the pistol, placing it in the drawer, but leaving the drawer unlocked, he and appellant both being present. They then took seats on the front porch of the feed store, where the courthouse would be in plain view. While they were sitting there, L. E. Devall came to the feed store, and in a conversation remarked, "It looks like the officers are getting busy up town," when appellant replied, "You must be next." When Devall replied he knew nothing of the matter, appellant spoke to Overcash and said, "Uncle Bill, he must be next," and then appellant remarked, "Well, one thing sure, I am not going to talk to them this evening; we ran for the same office once, and he (Spurlock) may be a better man than I am in one way, but by God he ain't in any other—I won't be talked to this evening; they can talk to me Monday, but as for that G—d d—n long legged Nichols, he can't talk to me at all." Witness Devall further testified that about that time appellant remarked, "There comes the G—d d—ned s—n of b—hes now," and he, witness, looked and saw the deceased, Sheriff Spurlock, and his deputy, Mr. Nichols, coming towards the feed store. That as appellant made this remark, he and Overcash got up, left the gallery and went in the feed store.

Deputy Sheriff Nichols says as they approached the feed store they saw appellant and Overcash get up and walk in the store, and he saw appellant go to this desk, where the pistol was in a drawer, get the pistol—Overcash got a shotgun, when they both returned to the front, one getting on the righthand side and the other the lefthand side of the door, when Overcash waved his hand, and instructed them to come no closer; that the deceased sheriff then told Condron he had a warrant for his arrest, and the shooting began, Overcash raising a shotgun and firing the first shot, and which shot was the one that inflicted the fatal wound. The State's witnesses would show that a general fusillade ensued in which Overcash, appellant, Spurlock and Nichols all engaged.

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Appellant in his testimony admits that he and Overcash were sitting on the gallery when Devall came to the feed store, and that when Devall told him about the officers getting busy he remarked that he (Devall) must be next, and that when he saw two men coming towards the feed store he made some remark, either "there comes the d—n rascals now," or the remark Devall says he made; that he thought it was Nichols and Jones who were approaching the store; that he and Overcash did get up and go in the store, and were in the relative positions that the State's witnesses place them. He denies that Spurlock told him he had a warrant for his arrest, but says when the officers approached the store Spurlock reached for his pistol, and Overcash for his shotgun, when the firing began, he stating that Spurlock fired first. He says he had no weapon at that time, but he was wounded in the leg, and fell back in doing so fell against the desk in which the pistol had been placed, and he then got the pistol, but did not shoot. After the difficulty the pistol was found near where appellant was sitting, and he asked the man who found it to put it away and say nothing about finding it. Virtually all the testimony, outside of that of appellant's, would go to show that both a shotgun and pistol were fired out of the house in which Overcash and appellant were situate, but there is a sharp conflict in the testimony as to who fired the first shot, Overcash or the deceased. This, we think, is a sufficient summary of the evidence to discuss the questions raised. There are no bills of exception to the reception or rejection of testimony, the whole attack being on the charge of the court as given.

The criticisms of the charge on murder need not be considered, as appellant was found guilty of only manslaughter, and the definition of manslaughter, if slightly inaccurate, would not be harmful to appellant, unless it conflicts with or infringes on the charge on self-defense, as appellant was given the lowest penalty for manslaughter.

The criticisms of the argument of State's counsel, in the light of the qualifications of the bills by the court, and the instructions given in regard thereto, present no error. The first criticism of the charge relates to the following paragraph of the charge:

"If on the day of the killing of the deceased, the defendant was in the grain house and feed store of W. J. Overcash, that was run in connection with a wagon yard, and was there carrying a pistol on and about his person, then I charge you that he was violating the laws of Texas, for which he was subject to arrest by the sheriff or any deputy sheriff of Throckmorton County, Texas, upon a warrant; and if the deceased, J. G. Spurlock, being the sheriff, and L. W. Nichols, being the deputy sheriff of said county, were informed by any credible person of such violation of the law, if any, by defendant, it became their duty to arrest defendant for such violation of the law, with a warrant, and if the officers were informed that the defendant had unlawfully carried a pistol, they were authorized by law to procure a warrant for the arrest of the defendant for such offense, and if

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they did procure a warrant from the justice of the peace of precinct number one of Throckmorton County, Texas, it was their duty under the law to execute the warrant by making the arrest of the defendant, and they were permitted by law to arm themselves for the purpose of overcoming such resistance, if any, as may be offered them by the defendant, or any other person on his behalf, and were further authorized by law to use all reasonable means to effect the arrest. The officers were not authorized by law, however, to use any greater force than was necessary to secure the arrest and detention of the defendant; and what force was necessary to secure the arrest and detention of the defendant, is a question of fact to be determined by the jury from all of the facts and circumstances in evidence in this case."

The criticism of this charge, that it is upon the weight of the evidence is not justified. This was but a statement of a proposition of law, if the jury found a given state of facts. It is also criticized on the ground that there was no evidence in the record that appellant was carrying a pistol on or about his person in the feed store, and presented an issue not made by the testimony. The evidence of Charlie Jones is that when he and appellant were having their trouble, appellant asked Overcash, "Where is my pistol," and then went and got it and fired it. We think this sufficient to authorize the court to charge as he did, but if in error in this, the undisputed facts show that Charlie Jones had filed a complaint against appellant charging him with carrying a pistol at that time; that a warrant was issued and delivered to the deceased sheriff for execution, and he had it in his possession when killed. The evidence would also tend strongly to show that appellant was aware that the officers were coming to arrest him on account of his trouble with Jones. It shows conclusively that appellant was sitting on the front porch of the feed store where he could have seen Jones and the justice of the peace go to the courthouse in a few minutes after his trouble with Jones, and when Devall told him about the officers getting busy up town he remarked, "You must be next," and the conversation that ensued, and the acts of defendant at the time, leads one inevitably to the conclusion that when he saw an officer coming towards the feed store he was aware that it was because of his trouble with Jones and firing the pistol, because he says he thought it was Jones and the deputy sheriff. So under no phase of the case could this paragraph of the charge be said to be injurious or hurtful to appellant. The further criticism that it "was a distinct assumption that he was in fact carrying a pistol" in that it charged the jury that under the circumstances stated it became the duty of the officer to arrest appellant. By reading the charge copied it will be seen that it instructs the jury "if they find that the officers were informed by a credible person of such violation of the law it became their duty to arrest the defendant," and this in accordance with the law of this State, for

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Article 479 of the Penal Code makes it the duty of an officer to arrest one when he is informed by a credible person that such person is carrying a pistol. (See also Jacobs v. State, 28 Texas Crim. App., 79; Ex parte Sherwood, 29 Texas Crim. App., 334; Miller v. State, 32 Texas Crim. Rep., 319.) In this case it is proven beyond dispute that the officers had been informed by Charlie Jones that appellant was carrying a pistol, and under the law it became their duty to arrest him, and the court in so instructing the jury committed no error. But in this case, the evidence goes further and shows that a warrant had been issued and delivered to the sheriff, consequently under no circumstances could this paragraph of the court's charge present any material error.

The court, in his charge, also instructed the jury: "The burden rests on the State to establish the guilt of the defendant beyond a reasonable doubt; and if after considering all of the evidence before you, you have a reasonable doubt of his guilt, you will acquit him; but if the evidence satisfies your mind beyond a reasonable doubt of the guilt of the defendant, as charged in the indictment, then you will convict him and ascertain from the evidence under the charge of the court, the grade or degree of the offense of which he is guilty and assess his punishment therefor accordingly.

"You are further instructed that the reasonable doubt also applies between the different offenses comprised in the charge; so if you find the defendant guilty, and have a reasonable doubt under the evidence as to what offense he has been guilty of, you will resolve such doubt in favor of the defendant, and find him guilty of the lesser and lower offense as between such offenses as you may be in doubt.

"The defendant is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt, and if you have a reasonable doubt as to his guilt you will acquit the defendant."

Appellant in his motion for new trial copies the paragraph first above quoted, and says that "it was calculated to make the jury believe that the court thought there was no reasonable doubt of appellant's guilt," and cites us to the case of Comegys v. State, 62 Texas Crim. Rep., 231; 137 S. W. Rep., 349. In the Comegys' case the first paragraph herein given was the only paragraph given on the doctrine of reasonable doubt, but in this case it is seen that this paragraph in this case is followed by two other paragraphs, the latter of which gives the defendant the benefit of the reasonable doubt in the language of our code. Take these three paragraphs, and when construed together, we think them a proper presentation of the law, and instead of depriving defendant of any right, or impressing the jury with the thought that the court believed defendant guilty, correctly instructs them that defendant is not only entitled to the benefit of doubt as to his guilt, but is also entitled to the benefit of doubt as between degrees of the offense submitted.

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The following paragraph of the court's charge is criticized in several paragraphs of the motion for new trial: "If you believe from the evidence that the deceased, J. G. Spurlock, and L. W. Nichols, went to the Overcash wagon yard and feed store to arrest the defendant, A. O. Condron, upon the charge of unlawfully carrying a pistol, and that they were armed with pistols and appeared thus armed before and near the door of said grain store, and that the appearance of officers thus armed, or their attempt to use such weapons, if they did so attempt to use them, or anything then done by said officers, or either of them at the time, either alone, or when taken into consideration with all the other facts and circumstances in evidence in this case, was such as would commonly produce such a degree of anger, rage, sudden resentment or terror, in a person of ordinary temper, under like circumstances with the defendant, as to render the mind incapable of cool reflection; or if you believe from the evidence that the said officers, in attempting to arrest the defendant, were using greater force than was necessary under the circumstances to secure the arrest and detention of the defendant; or that they had time and opportunity to inform him by what authority they were about to arrest him, and having such time and opportunity failed to inform him, and that their manner of attempting such arrest was such as would commonly produce such a degree of anger, rage, sudden resentment or terror, in a person of ordinary temper, under like circumstances with the defendant, as to render the mind incapable of cool reflection, and while under the influence of such sudden passion he participated as a principal offender, if he was such offender, in killing J. G. Spurlock at the time and place charged in the indictment, then you will find the defendant guilty of manslaughter and assess his punishment accordingly at confinement in the penitentiary for not less than two nor more than five years, unless you should find and believe from the evidence that the killing was done in his lawful self-defense under the law as hereinafter given you in this charge, or in the lawful defense of W. J. Overcash."

This was the paragraph under which appellant was found guilty. In other parts of the charge the court had given a proper definition of manslaughter, but the motion alleges that this paragraph "denies to the defendant the presumption of innocence and benefit of reasonable doubt" in that it requires the jury to believe certain facts. This is proper where the court is instructing the jury under what conditions one may be convicted. Our law requires the jury to find facts affirmatively before they are authorized to convict a person of any offense or degree of an offense, and the doctrine of reasonable doubt need not be appended to each paragraph of the charge if the charge as a whole properly instructs the jury on that issue. We have copied a part of the charge hereinbefore to conclusively demonstrate that the jury were not only told that defendant was entitled to the benefit of a reasonable doubt as to his guilt, but also to the

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benefit of doubt as to the degree of offense. In Edens' case, 41 Texas Crim. Rep., 525, this court said: "We think the court's charge wherein he tells the jury 'defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and in case of reasonable doubt in your minds as to defendant's guilt you will acquit him and say by your verdict not guilty,' is sufficient application of the law of reasonable doubt to the different phases of the evidence; and it was not incumbent upon the court to attach to each clause of his charge the law of reasonable doubt." For a citation of the cases so holding see Overcash v. State, 67 Texas Crim. Rep., 181, 148; S. W. Rep., 701. On the other hand, in another part of the motion, appellant takes the opposite view of this paragraph and complains that it is error because it authorized the jury to convict "if they believed," etc., and did not tell them they must so believe "beyond a reasonable doubt." In one instance claiming that it took away from the defendant the benefit of "a reasonable doubt," and then claiming that it authorized the jury to convict on a preponderance of the evidence. The charge when read as a whole does neither of these things, and the propositions present no error. However, the court instructed the jury in another part of his charge: "But if the deceased and L. W. Nichols attempted to arrest the defendant, with a warrant in wanton manner, and in doing so used greater force than was necessary in the attempted arrest of the defendant, the use of such greater force than was necessary, if any, was illegal, and the defendant had the lawful right to resist it, and if necessary or apparently necessary in his self-defense, to kill the party or parties engaged in such unlawful attempt to use such unnecessary force, if any was used by them." And appellant insists that these two charges are in conflict, in one instance instructing the jury that if the officers were using greater force than was necessary under the circumstances to effect an arrest, and their manner of attempting such arrest was such as would commonly produce such a degree of anger, rage, sudden resentment or terror, in a person of ordinary temper, as to render the mind incapable of cool reflection (unless you should find and believe from the evidence that the killing was done in his lawful self-defense under the law as hereinafter given you in charge, or in lawful defense of W. J. Overcash), he would be guilty of manslaughter, and in the other instructing them "if the arrest was made in a *wanton manner,* and in doing so used greater force than was necessary, the defendant would be justifiable." The argument being that if the killing took place while the officers were using greater force than was necessary to effect an arrest, this in and of itself alone would justify the homicide. This is not the law. No one is justified in killing another unless it reasonably appears to him from the conduct and acts of the parties that his life is in danger, or he is in danger of serious bodily injury. The court in the latter paragraph tells the jury, if the attempt to arrest was in a wanton

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manner and more force was used than was necessary, *and if it was necessary or apparently necessary* to kill in defense of himself, he would be guilty of no offense. We think instead of being in conflict with each other, the charge clearly draws the correct and proper distinction in this character of case. No one, we think, can seriously contend that because an officer in attempting to make an arrest uses more force than is necessary it would justify another in slaying the deceased. He, it is true, if the arrest is unlawful, is authorized to use force to combat force, but his right to kill does not arise until, from the appearances, he thinks his life is in danger, or he is in danger of some serious bodily injury. The right to slay another does not arise solely from the use of "more force than necessary"; it takes more than that, and in connection therewith, from some act or conduct on the part of the officer, it must reasonably appear to a defendant that such officer intends to kill or inflict serious bodily injury. There is no conflict in the two paragraphs of the charge, but correctly draws a line of distinction when the acts of the officer would reduce the offense to manslaughter, and when his acts would justify the killing. This clause occurs where the court is giving definitions of law as to the different issues in the case, and when the court applies the law of self-defense he does so properly, as shown by the paragraphs herein copied. The court in this charge on manslaughter criticized tells the jury that he would be guilty of manslaughter, "unless from the evidence it appeared that the killing was done in lawful self-defense as hereinafter given you in charge," and then instructs them fully as to the circumstances under which appellant would be justified, and guilty of no offense, instructing the jury:

"If you believe from the evidence that W. J. Overcash did kill the deceased at the time and place charged in the indictment and that this defendant, A. O. Condron, participated in such killing, but should further believe from the evidence that at the time W. J. Overcash fired with a shotgun, the first shot fired by him, if you believe that he fired any shot, that the sheriff or his deputy were attempting to use on him or this defendant a deadly weapon, or by some act done by said Spurlock or Nichols, at the time, reasonably indicated to the defendant and created in the mind of the defendant a reasonable expectation or fear that they were, or either of them was, about to make an attack upon the defendant, or upon W. J. Overcash, with a weapon calculated to produce death or serious bodily injury, then it would be presumed from such act that they intended to make use of such weapon to kill the defendant, or said Overcash, or to inflict serious bodily injury upon him or them, and you will in such case if you so believe, acquit the defendant as having acted in self-defense or in defense of another.

"If the acts of Spurlock or Nichols were such as to justify the defendant or W. J. Overcash in killing Spurlock under the law of self-defense, as given you in charge, then neither the defendant nor

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Overcash were, under the law, required to retreat in order to avoid the necessity of killing the deceased.

"You are instructed that if the proof shows in this case that W. J. Overcash killed the deceased Spurlock, then before you would be authorized to convict the defendant of any grade of culpable homicide you must find from the evidence beyond a reasonable doubt that the said W. J. Overcash unlawfully killed the deceased Spurlock, and that the defendant was present and knew of the unlawful intent on the part of W. J. Overcash, and so knowing aided him by acts, or encouraged him by words or gestures to kill the said Spurlock, and in that connection you are charged that the mere presence of the defendant in company with said Overcash will not be sufficient to establish the defendant's guilt, but the proof must go further and establish beyond a reasonable doubt that said W. J. Overcash unlawfully killed the deceased, and that the defendant knowing the unlawful intent of the said Overcash to kill said Spurlock, aided and abetted him in said killing, and if you have a reasonable doubt as to the existence of either one of the above propositions, you will acquit the defendant.

"If you believe from the evidence that the deceased Spurlock, and L. W. Nichols, when they appeared in sight of the defendant before the door of W. J. Overcash's grain store, by some act done by them, or either of them, indicated a present purpose and an immediate intention to use upon the defendant, or W. J. Overcash, a weapon which might cause the death of or produce serious bodily injury to either W. J. Overcash or defendant, or if such acts of said Spurlock or Nichols, reasonably so appeared to the defendant at the time, viewed from his standpoint, and said acts of deceased or Nichols at the time were reasonably calculated to create in the mind of the defendant, and did create in his mind a reasonable expectation or fear of death or serious bodily injury, to either W. J. Overcash or defendant, and if you find that then and there, the defendant moved by such reasonable expectation or fear (if he was so moved) of death or serious bodily injury participated in the killing of said Spurlock if he did so in any manner, and you believe that said Overcash killed said Spurlock then the killing was under the law justified as done in his lawful self-defense, or in defense of another, and you will acquit defendant if you so believe even though the danger was not actual, but apparently so; provided the danger reasonably appeared to the defendant, under all of the facts and circumstances at the time, to be real and actual, viewed from the defendant's standpoint.

"If you believe from the evidence under the foregoing charges of the court upon the law of self-defense, that the defendant or Overcash was justified in firing the shot that killed the deceased, Spurlock, if any, then you are instructed that the subsequent shots fired by the defendant or Overcash, if any, are immaterial, and that the defendant had the right to continue to fire so long as danger,

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real or apparent, considered from the defendant's standpoint, continued to exist.

"The defendant A. O. Condron cannot be convicted of any offense unless you believe from the evidence beyond a reasonable doubt that W. J. Overcash unlawfully killed J. G. Spurlock in a shooting between W. J. Overcash on the one side and Spurlock and Nichols on the other, and if you believe from the evidence that the defendant Condron, did not engage in the shooting between Spurlock and Nichols on the one side and Overcash on the other, nor participate in the acts of W. J. Overcash as a principal offender, if he was such offender, until after he was fired upon or shot by J. G. Spurlock or Nichols, and that he had, or procured a weapon and then fired or attempted to fire at either or both Spurlock or Nichols, he would not be guilty, and if you so believe or have a reasonable doubt thereof, you will acquit the defendant."

These paragraphs present every phase of self-defense as made by the evidence, and in a manner we do not think, when the charge is read as a whole, is subject to any criticism. This is a companion case to that of Overcash v. State, 67 Texas Crim. Rep., 148; S. W. Rep., 701, and all the other questions raised by appellant in his motion for new trial are discussed in that case, and the authorities there cited, and which is here referred to.

Being of the opinion that no reversible error is pointed out in the motion for a new trial, and that the charge fully presents every theory of the case as favorable to defendant as the law authorizes, the judgment is affirmed.

Affirmed.

[Rehearing denied April 2, 1913.—Reporter.]

DAVIDSON, PRESIDING JUDGE (*dissenting*).—This is the second appeal of this case, the former appeal being reported in 62 Texas Crim. Rep., 485. It is also a companion case to Overcash v. State, 67 Texas Crim. Rep., 148; S. W. Rep., 701.

I deem it unnecessary to make a statement of the facts except as may be incidentally connected with the legal questions discussed. The court gave the following charge:

"If on the day of the killing of the deceased, the defendant was in the grain house and feed store of W. J. Overcash, that was run in connection with a wagon yard, and was there carrying a pistol on and about his person, then I charge you that he was violating the laws of Texas, for which he was subject to arrest by the sheriff or any deputy sheriff of Throckmorton County, Texas, upon a warrant; and if the deceased, J. G. Spurlock, being the sheriff, and L. W. Nichols, being the deputy sheriff of said county, were informed by any credible person or such violation of the law, if any, by defendant, it became their duty to arrest defendant for such violation of the law, with a warrant, and if the officers were informed," etc. The

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charge also further instructed the jury that these officers were not authorized by law, however, to use *any greater force than was necessary* to secure the arrest and detention of the defendant, and what force was necessary to secure the arrest and detention of the defendant was a question of fact to be determined by the jury from all of the facts and circumstances in evidence in the case. Several objections were urged to the charge, among others, that it was an assumption of a fact, that is, that portion of the charge which informed the jury that if appellant was carrying a pistol on or about his person at the feed store he would be violating the law, which authorized the deceased sheriff and his deputy to make the arrest, etc. The evidence discloses, as far as I have been able to ascertain from the record, that there had been a difficulty between appellant and Charley Jones a short time before the shooting, which resulted in the homicide of Spurlock; that Jones informed the sheriff's office of that fact, and made an affidavit against appellant for carrying a pistol. The facts in connection with the difficulty between Jones and appellant as detailed by the witnesses Pigg and Barnes and appellant are about as follows: Jones had gone into the grain house of Overcash where appellant was, a quarrel and difficulty ensued, during which appellant reached up and secured out of the coat pocket of Overcash, which was hanging near by, a pistol. This seems to be uncontradicted. Jones' evidence would convey the idea that appellant shot between his feet or into the floor about his feet for the purpose of frightening him. About the time that appellant obtained the pistol from the pocket of Overcash's coat, Overcash came upon the scene and undertook to take the pistol from appellant, and while they were scuffling over it it was accidentally discharged, the ball entering the floor near where Jones was standing. All the witnesses agree that Overcash took the pistol from appellant, broke it and dropped the shells from it and immediately locked it in his (Overcash's) desk. Jones went away and made the affidavit against appellant for carrying a pistol. The facts stated do not constitute carrying a pistol on and about the person of appellant. When the difficulty between himself and Jones occurred he reached up in the pocket of Overcash's coat and got the pistol, which Overcash undertook to take away from him, when it was accidentally discharged. This does not constitute carrying a pistol, and the court was in error in so instructing the jury and authorizing them to so find or believe. The court by this charge assumed and charged upon a phase of the case not justified by the facts, and, of course, detrimentally to appellant before the jury. It assumed or authorized the jury to assume a fact which was not a fact and not supported by the evidence.

There is another phase of this matter that ought to be noticed. The court having given the charge above quoted and criticized, failed to give the converse of the proposition, that is, if appellant did not carry the pistol, then the jury was not authorized so to find. If he did not

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carry the pistol he was not violating the pistol law, as the court instructed the jury he was doing by carrying it. The charge does not relieve the case of the assumption of the fact that appellant was carrying a pistol. The charge was on the weight of evidence by putting it to the jury as it did, authorizing them to believe he was carrying the pistol, in the first instance, and in not giving the converse of the proposition after having given the charge given. The jury is not authorized to believe nor the court to charge the jury that they might believe a fact against an accused when the facts and circumstances in evidence do not justify or raise it. It was the assumption of a damaging fact against the accused not in evidence, and placed him in the attitude of being a violator of the law and a wrongdoer. He may have violated the law in shooting at the man's feet, if he did shoot at his feet or between them, or in front of him, but that charge was not given by the court.

The court charged the jury as follows: "If you believe from the evidence that the deceased, J. G. Spurlock, and L. W. Nichols, went to the Overcash wagon yard and feed store to arrest the defendant, A. O. Condron, upon the charge of unlawfully carrying a pistol, and that they were armed with pistols and appeared thus armed before and near the door of said grain store, and that the appearance of the officers thus armed, or their attempt to use such weapons, if they did so attempt to use them, or anything then done by said officers, or either of them at the time, either alone, or when taken into consideration with all the other facts and circumstances in evidence in this case, was such as would commonly produce such a degree of anger, rage, sudden resentment or terror, in a person of ordinary temper, under like circumstances with the defendant, as to render the mind incapable of cool reflection; or if you believe from the evidence that the said officers, in attempting to arrest the defendant, were using greater force than was necessary under the circumstances to secure the arrest and detention of the defendant; or that they had time and opportunity to inform him by what authority they were about to arrest him, and having such time and opportunity failed to inform him, and that their manner of attempting such arrest was such as would commonly produce such a degree of anger, rage, sudden resentment or terror, in a person of ordinary temper, under like circumstances with the defendant, as to render the mind incapable of cool reflection, and while under the influence of such sudden passion he participated as a principal offender, if he was such offender, in killing J. G. Spurlock at the time and place charged in the indictment, then you will find the defendant guilty of manslaughter and assess his punishment accordingly at confinement in the penitentiary for not less than two nor more than five years."

Various objections were urged to this charge. I deem it unnecessary to recapitulate them. Before mentioning the criticisms of the above charge, which is No. 18 in the general charge, I desire to notice

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another phase of the court's charge, subdivision 13, which is as follows: "But if the deceased and L. W. Nichols attempted to arrest the defendant, with a warrant in wanton manner, and in doing so used greater force than was necessary in the attempted arrest of the defendant, the use of such greater force than was necessary, if any, was illegal, and the defendant had the lawful right to resist it, and if necessary or apparently necessary in his self-defense, to kill the party or parties engaged in such unlawful attempt to use such unnecessary force, if any was used by them."

These charges are incompatible and in conflict. In one of the charges the jury is instructed that if the parties undertook to arrest in a wanton and unjustifiable manner, *using greater force than was necessary,* the defendant had the right to resist, and would be justified in killing. In the other charge the jury is instructed that if the sheriff undertook to arrest and *used greater force than was necessary,* and without giving the party notice of his purpose to arrest, etc., and *used greater force than was necessary,* he, the defendant, nevertheless, would be guilty of manslaughter. So it is observable that under one charge defendant would be justified in resisting, even to killing. Under the other he would not be justified, but would be guilty of manslaughter. These charges are confusing, and to say the least of it, contradictory. Wherever charges on the same subject are thus contradictory, objections to them are well taken and the error is reversible. As I understand this record, the greater force that was used by the officers was shooting at Overcash and appellant, during which they shot appellant and wounded him. The law with reference to the use of greater force does not belong under such state of facts. If the officers in approaching the two defendants began firing upon them, the question of greater force is not an issue in the case, and this limitation upon the right of self-defense was unjustifiable, and yet the jury is instructed that under this condition in one charge they could convict of manslaughter, and under the other they could acquit on the theory of justification.

Section 28 of the charge reads thus: "The burden rests on the State to establish the guilt of the defendant beyond a reasonable doubt; and if after considering all of the evidence before you, you have a reasonable doubt of his guilt, you will acquit him; but if the evidence satisfies your mind beyond a reasonable doubt of the guilt of the defendant as charged in the indictment, then you will convict him and ascertain from the evidence under the charge of the court, the grade or degree of the offense of which he is guilty and assess his punishment therefor accordingly." This charge is held to be error in Comegys v. State, 62 Texas Crim. Rep., 235. The Comegys' case lays down the correct and well settled rule. Appellant had the right to have reasonable doubt and presumption of innocence presented to the jury untrammeled by such qualification. That the State's side of the case may and should be appropriately submitted

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to the jury is the law of the land, but it is equally the law that the defendant shall have his side of the law, that is, such phases of the law as guarantee his legal rights, given untrammeled by qualifications that cut him off from the benefit of such law.

There is another contention urged by appellant, to-wit: That in section 20 of the charge the court shifts the burden, or rather places it on defendant to show the deceased was attacking him or about to do so at the time of the killing. This was given as a basis for a further charge of the court to the effect that if the officers were armed at the time of the diculty, the law would presume they intended to kill or inflict serious bodily injury. This charge as given was error in my judgment. That the officers were armed was undisputed, for they began shooting and continued shooting until Spurlock was killed and defendant was shot down. The legal presumption that the officers intended to kill by the use of the means used by them should not have been curtailed as it was by the court in his charge. I deem it unnecessary to go further with this matter.

Believing as I do, under the unbroken line of authorities and the settled law in Texas, that appellant has not been tried according to law, and has been deprived of those rights guaranteed under statutory enactments in this State, I enter the above why I cannot agree with this affirmance. I therefore must respectfully enter my dissent.

MAGRUDER TAFF V. STATE.

No. 2285. Decided March 5, 1913.

Rehearing denied April 2, 1913.

1.—Assault to Rape—Sufficiency of the Evidence—Alibi—Charge of Court—Specific Intent—Woman of Loose Virtue.

Where, upon trial of assault to rape, the evidence was sufficient to sustain the conviction, and the court fully instructed the jury on the issue of alibi raised by the evidence and submitted defendant's special instructions on specific intent to rape, there was no error in refusing other special charges on the same subject, and the contention that prosecutrix was a woman of loose virtue was no defense, and there was no error.

2.—Same—Charge of Court—Attempt to Rape.

Where, upon trial of assault to rape, the evidence did not raise the issue of an attempt to rape, there was no error in refusing a special charge thereon.

3.—Same—Evidence—Other Testimony Showing Same Fact.

Where the evidence was admissible under the qualifications of the bills of exception; there was no error; besides, the same facts were shown on cross-examination and by other witnesses.

4.—Same—Former Conviction—Lower Degree of Offense.

Where, upon appeal from a conviction of assault to rape, it appeared from the record that the defendant pleaded guilty to aggravated assault on an information filed in the County Court for the same transaction under a fraudulent effort to oust the jurisdiction of the District Court of the case there pending for assault with intent to rape, the court properly struck out said plea.

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This was specially authorized under Article 63, Code Criminal Procedure, as amended.

5.—Same—Case Stated—Jurisdiction—County Attorney.

Where defendant was indicted in the District Court for assault with intent to rape and convicted and appealed therefrom to this court, and pending such appeal, by agreement with the county attorney, pleaded guilty, on an agreed statement of facts, to an aggravated assault upon an information filed in the County Court, the jurisdiction of the District Court was thereby not ousted and the county attorney had no authority to make such agreement under Article 63, Code Criminal Procedure, as amended. Following Johnson v. State, 148 S. W. Rep., 300.

Appeal from the District Court of Lee. Tried below before the Hon. Ed. R. Sinks.

Appeal from a conviction of assault with intent to rape; penalty, three years imprisonment in the penitentiary.

The opinion states the case. See 65 Texas Crim. Rep., 80.

E. T. Simmang, for appellant.—On the question of plea of former conviction: Pearce v. State, 50 Texas Crim. Rep., 507; 98 S. W. Rep., 861; Grisham v. State, 19 Texas Crim. App., 504; Schindler v. State, 15 id., 394; Quitzow v. State, 1 Texas Crim. App., 52; Pascal v. State, 49 Texas Crim. Rep., 111; Corbett v. State, 63 id., 478; Johnson v. State, 64 id., 416; Herera v. State, 35 id., 607; Moore v. State, 33 id., 166; Homer v. State, 65 S. W. Rep., 371.

On question of attempt to rape: Ford v. State, 41 Texas Crim. Rep., 270; Holloway v. State, 54 Texas Crim. Rep., 465; Milton v. State, 23 Texas Crim. App., 204; Robinson v. State, 60 Texas Crim. Rep., 592; 132 S. W. Rep., 944.

On question of insufficiency of the evidence: Scott v. State, 51 Texas Crim. Rep., 5; Cotton v. State, 52 id., 55; Porter v. State, 33 Texas Crim. Rep., 385; Cromeans v. State, 59 id., 611; Wood v. State, 61 S. W. Rep., 308; Eiley v. State, 55 Texas Crim. Rep., 1; Dina v. State, 46 id., 402; Carson v. State, 24 S. W. Rep., 409; Fields v. State, 24 S. W. Rep., 907; Hancock v. State, 47 S. W. Rep., 465; Ross v. State, 78 S. W. Rep., 503; Collins v. State, 52 Texas Crim. Rep., 455; Caddell v. State, 44 id., 213; Sirmons v. State, 44 id., 488; Warren v. State, 51 id., 598; Marthall v. State, 34 id., 22; Mathews v. State, 34 id., 479; Dockery v. State, 35 id., 487; Ellenberg v. State, 36 id., 139; Clark v. State, 39 id., 152; Saddler v. State, 12 Texas Crim. App., 194; Peterson v. State, 14 id., 162; Thomas v. State, 16 id., 535; Jones v. State, 18 id., 485; Passmore v. State, 29 id., 241; Curry v. State, 4 id., 574; Sanford v. State, 12 id., 196; O'Brien v. State, 40 S. W. Rep., 969; Coffee v. State, 76 S. W. Rep., 761; Milton v. State, 23 Texas Crim. Rep., 204.

C. E. Lane, Assistant Attorney-General, for the State.—On question of plea of former conviction: Schindler v. State, 15 Texas

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Crim. App., 394; Williams v. State, 20 id., 357; Rain v. State, 16 id., 282; Vaughn v. State, 32 Texas Crim. Rep., 407.

HARPER, JUDGE.—Appellant was convicted of assault with intent to commit the offense of rape, and his punishment assessed at three years confinement in the penitentiary.

The facts would show the prosecuting witness, Miss Selma Franke, was living with her mother at the crossing of two public roads; that Messrs. Lucas, Hoffman and Schkate lived near to her mother's home. On the night in question Miss Selma says some one appeared at their home and knocked on the door, and then tried to push the door open; when she would not admit him, he left, but shortly returned and came to a window, and asked Miss Selma to come out, offering her from five to ten dollars to do so. That she asked him to leave, and he agreed to do so if she would give him some bread and butter, which she did. He left, but again came back and asked for water, and when she gave it to him, and after he had drank the water, he undertook to raise the window; as he did so, she endeavored to prevent the window being raised, when appellant caught her by the wrist and pulled her towards him. She then discovered, for the first time, that her assailant was a negro, when she screamed, jerking away from appellant. He left, and shortly after she screamed Messrs. Hoffman and Lucas came, when she told them of the transaction.

Appellant denies that he was the person who went to the prosecuting witness' house, and denies any knowledge of the matter, and says he is not the person who caught her by the hand and pulled her to him.

It is sufficient to say that the evidence justified the jury in finding that appellant was the person who went to the home of Mrs. Franke and made the assault on her daughter. As appellant's testimony raised the issue of an alibi, the court fully instructed the jury in regard to that issue, and appellant does not complain of the charge in that respect. In addition to fully instructing the jury as to the elements of an assault to rape, the court also gave the following special charge, requested by appellant: "You are instructed that every assault committed by an adult person upon the person of a female does not constitute the offense of an assault with the intent to commit rape, but in order to make the offense an assault to rape the defendant must commit an assault upon the female with the specific intent to have intercourse with her by force and without her consent. An assault upon a woman with intent to have improper intercourse with her but without the use of force and without the consent of the woman does not constitute the offense of assault to rape, no matter how offensive the defendant's acts may be or how aggravated the circumstances. Now if you believe from the evidence that the defendant committed an assault upon Selma Franke, if you believe any assault was committed by the defendant and that at the time he com-

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mitted the assault he intended to have carnal intercourse with Selma Franke provided the said Selma Franke would submit to him and that he did not intend to have carnal intercourse with the said Selma Franke without her consent and by force or against her will, then you are instructed that under the law the defendant would not be guilty of the offense of assault to rape, and if you so believe it becomes your duty under your oaths to find the defendant not guilty of the offense of assault to rape." And having given this charge, there was no need or necessity to give special charge No. 3, requested.

Even, if as contended by appellant, the prosecutrix was a woman of loose virtue, she would have the right to sell her person to whom she pleased; and being a white woman, even if she was guilty of having carnal knowledge with white men, this would not imply that she was also willing to sell her person to negroes, and she would have the right to object to approaches from that race, and no person, when she objected, would have the right to undertake to possess himself of her person by force and have carnal knowledge of her without her consent. And the court in his main charge and in the special charge given at the request of appellant, fully instructs the jury that if appellant did not intend to have carnal knowledge of the prosecutrix without her consent and by force, he could not be convicted of assault with intent to rape. The jury found against this contention, and we think the facts justify them in so finding.

The other special instruction in which appellant requested the court to instruct the jury that the facts in the case constituted, if any offense, "an attempt to rape" and not "assault to rape" as charged, should not have been given. The evidence in this case, if it shows anything, shows that an assault was made by appellant on prosecutrix, therefore, he was properly indicted for an assault to rape. An "attempt to rape" can be committed without an assault being made on the person of the alleged injured female, but an assault to rape an assault on the person is one of the constituent elements. The assault can be made in any of the ways defined by the Code.

The testimony of the witnesses Lucas and Hoffman was admissible under the qualifications of the bills as made by the court. But in no event could it have been hurtful, for the same facts are developed by defendant in cross-examination and direct examination of witnesses.

The only other ground in the motion for new trial that needs to be discussed is the one which complains of the court striking out his plea of former jeopardy, or conviction of an aggravated assault. It appears that appellant was indicted by the grand jury on October 11, 1911, charged with assault with intent to rape—the indictment under which he was convicted in this case. That he was arrested on said indictment, tried and convicted at that term of court of assault to rape. He appealed his case to this court, and on January 31, 1912, this court reversed and remanded the cause to the District Court; that appellant was under bond to appear at the next term of the

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District Court for trial. That after the case was reversed, the record shows that on the 6th day of April, 1912, his half-brother, Thomas Taff, filed a complaint against him, charging him with an aggravated assault, it being for the same transaction for which an indictment was then pending against him in the District Court in which he was charged with an assault to rape, and for which offense he had been convicted, but which judgment was reversed; that the county attorney, based on this complaint, filed an information in the County Court, when on an agreed statement of facts the cause was submitted to the county judge, without a jury, and appellant was adjudged guilty of an aggravated assault, and his punishment assessed at a fine of $25. Appellant, when the case was called in the District Court subsequently, on the 29th of April, filed his plea, alleging this conviction for aggravated assault as a bar to further prosecution herein under the indictment in the District Court. The court heard evidence on this plea and sustained the motion of the district attorney striking out this plea, and to this action of the court appellant excepted, and brings this question to us for review. In a great many cases, even before the amendment to Article 63 of the Code of Criminal Procedure in 1903, it was held that where an indictment or information was pending against one charging him with crime, his voluntary appearance in another court and entering a plea to a lesser offense, would be a fraud upon the jurisdiction of the court in which the case was first pending, and would not be a bar to further prosecution of the offense in the court in which it was first filed. If the allegations contained in the motion of the district attorney to strike the plea from the record in this case was sustained, it would clearly show a fraudulent effort to oust the jurisdiction of the District Court of an offense then pending in said court and of which he had been convicted—an offense of which the county court had no jurisdiction. The statement of facts filed in connection with said plea does not show that he was ever arrested on the complaint and information charging him with aggravated assault in the county court, but does show, "That defendant appeared in person and by counsel; a jury was waived, and the matters in controversy were submitted to the court *upon an agreed statement of facts,*" this clearly evidencing to our minds that the complaint and information were filed with the knowledge, consent and connivance of defendant, and this is borne out when we find the complaint was filed by his half-brother, Thomas Taff. Under all the decisions rendered by this court, when the evidence discloses that the prosecution in the latter court for a lesser degree of the offense, or lesser offense, is not a bona fide prosecution for such offense, but is but an effort made to bar a prosecution for a higher grade of offense or degree of offense, then pending in another court, had and secured with the connivance and consent of appellant, it would be a legal fraud and does not bar a prosecution for the offense for which he

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was first arrested, and which was pending at the time of the institution of the latter.

But since the rendition of this line of decisions, the Legislature in 1903 amended Article 63 and provided, "That when two or more courts have concurrent jurisdiction of any offense against the penal laws of this State, the court in which an indictment or a complaint shall first be filed shall retain jurisdiction of said offense *to the exclusion of all other courts.*" Thus, so far as it lay in the power of the law-making body protecting the defendant from having a multiplicity of complaints or indictments filed against him for the same offense in different courts, and also prohibiting these efforts being made to bar a prosecution for a higher grade of offense, after indictment found, by having a court of inferior jurisdiction take cognizance of the case and adjudge such person guilty of a lesser degree of offense than that charged in the indictment first filed. Whenever the record suggests collusion, as does the record in this case, the latter will not bar a prosecution under the indictment first filed.

We are not discussing a case where two prosecutions are pending, and where one is arrested and brought to trial on the second case filed without his connivance or consent, and where at the time of trial enters his protest, and yet notwithstanding such protest he is against his will and consent forced to stand trial. Such a case is not now before us. Every person is presumed to know the law, and his acts must be viewed from the standpoint that he possessed this knowledge, and a fraud can not be practiced upon the jurisdiction of the District Court of Lee County, although same was attempted to be done with the connivance of the county officers. It is true, the county attorney is the representative of the State, but he has only such authority as is delegated to him by the laws of the State, and in instances of this character the law has deprived him of authority to act, or if he does presume to act, he acts beyond the scope of authority conferred on him. As illustrative of the question: If one was indicted for murder, and the District Court had obtained jurisdiction not only of the offense but also the person of a defendant, the law saying that the court first obtaining jurisdiction shall retain jurisdiction to the exclusion of all others, he would not be permitted to agree with the defendant upon a statement of facts which would only show aggravated assault, and go into court and submit that statement and have a person adjudged guilty of aggravated assault in the county court, and thus bar the prosecution for murder. Such a doctrine would be monstrous, and can not and will not be upheld by this court. The county attorney in such instance would not be acting within the scope of the power delegated to him, and he could not bind his principal, the State of Texas. We discussed the construction of this statute at some length in the case of Johnson v. State, 67 Texas Crim. Rep., 95, 148 S. W. Rep., 300, and there cite the authorities, and do not deem it necessary to do so again. The Legislature, under the

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provisions of our Constitution, had the right to enact this law, and under its provisions and the facts of this case the trial court did not err in the matter

The judgment is affirmed.

Affirmed.

[Rehearing denied April 2, 1913.—Reporter.]

Tom Fuller v. State.

No. 2331. Decided March 5, 1913.

Rehearing denied March 26, 1913.

1.—Assault to Rape—Continuance.

Where it appeared on motion for new trial that the testimony of the alleged absent witness, to the effect that defendant would be welcome at the house of prosecutrix, would not extenuate or justify a subsequent course of defendant in using force upon the prosecutrix by a violent assault and threats, there was no error in overruling the motion for continuance and new trial.

2.—Same—Aggravated Assault—Charge of Court.

Where defendant was under twenty-one years of age and made an assault upon a female, there was no error in the court's failure to charge on aggravated assault upon trial of assault with intent to rape, the jury convicting him of this offense, and the court charging on simple assault.

3.—Same—Argument of Counsel.

Where, upon trial of assault to rape, the court charged the jury to disregard the remarks of State's counsel, which were improper, but not of sufficient importance to cause a reversal, there was no error.

4.—Same—Evidence—Outcry.

Upon trial of assault with intent to rape, there was no error in admitting testimony that the prosecutrix a few minutes after the assault upon her ran out of the house and stated that defendant made an assault upon her and asked what to do, and that they phoned to an officer.

5.—Same—Evidence—Res Gestae.

Upon trial of assault with intent to rape, there was no error in admitting in evidence the declarations of prosecutrix occurring shortly after the alleged assault, after she had gone about a quarter of a mile from where it occurred, and in answer to a question, reported what had happened to her and that defendant had assaulted her.

Appeal from the District Court of Parker. Tried below before the Hon. J. W. Patterson.

Appeal from a conviction of assault with intention to rape; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Wood & Shadle, for appellant.—On question of court's failure to charge on aggravated assault: White v. State, 151 S. W. Rep., 826; Holliday v. State, 35 Texas Crim. Rep., 133; Tucker v. State, 43 S. W. Rep., 106.

C. E. Lane, Assistant Attorney-General, for the State.

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DAVIDSON, PRESIDING JUDGE.—Under a conviction of assault to rape appellant was given two years in the penitentiary.

Appellant complains the court erred in overruling his application for a continuance on account of the absence of two witnesses, by one of whom he expected to prove that during the summer of 1912, the witness was employed by the county working on the county road in the vicinity of where the alleged assault occurred, and that the camp at which the witness was located was about a quarter of a mile from the home of the prosecutrix. That during this time he had often "kept company" with her, and that he was intimate with said prosecutrix, and that on one occasion she told the witness that defendant had been trying to get her to have intercourse with him, and she had promised to do so but was not going to for the reason she was afraid he would tell it. By the other witness he expected to prove that in the latter part of August, 1912, the day previous to the alleged assault, this witness saw prosecuting witness on the morning of the alleged occurrence, and on that day, prior to the alleged occurrence, she told the absent witness to tell the defendant that her folks were gone fishing, and to come over and they would have a time, and witness informed appellant on the evening of and before the alleged occurrence, and that on the trial witness would swear that defendant went there on that invitation. As a preliminary statement, and supposedly to make this testimony relevant, the bill recites in regard to both of the absent witnesses, that the defendant is charged with assault with intent to commit rape on Janie Mays by force, threats and fraud, alleged to have occurred on the 30th of August, 1912, at home near the town of Garner, Parker County. On the trial of the case the defendant will plead not guilty and will testify that whatever occurred on that occasion of the alleged offense was done with the consent of the prosecuting witness, Janie Mays; that he was at her house on said occasion at her invitation, and that he had no intention of having intercourse with her except with her consent; and that defendant is informed and states that the prosecuting witness will swear upon the trial of this case that defendant on said occasion as alleged in the indictment, at her home, assaulted her by force and threats and took hold of her and attempted to force her to have intercourse with him against her will and consent, and said prosecuting witness will swear that defendant had never spoken to her about having intercourse with him before this occasion, and the defendant will testify on the trial hereof that he had talked with the prosecuting witness on two or more occasions before the date of the alleged offense about having intercourse with her and that on two different occasions she had promised to let him do it, but was afraid her brothers would catch them. The appellant did not testify in his own behalf, and none of the facts of which he speaks were introduced in evidence to show any connection between his acts and any information he may have had from either of the absent witnesses inducing him to go to

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the residence of the prosecuting witness. We are of opinion that the testimony of the absent witnesses, viewed in the light of the record, would not be of any material value in the case had they been present and testified. There is nothing in the record that indicates that any such thing occurred between the absent witnesses and the prosecutrix. When appellant went to the home of prosecutrix he informed her he came there for the purpose of giving her brother a whipping for some grievance against said brother. This was not in any way controverted. Prosecutrix testimony makes out a case against defendant of an attack upon her of strongly developed physical force, over her protest, he locked her in a room where she for a while could not escape. He carried this attack sufficiently far to tear much of her clothing from her body, threw her on the bed and demanded that she have intercourse with him; that she refused, and fought her way out of his clutches and away from the room, fleeing to the home of a nearby relative, where she immediately gave information. If it be conceded that the girl probably made the statements to the two absent witnesses, yet when he approached her at her home she declined to have anything to do with him, and he made a most vigorous assault; he understood from what occurred between them at the time that his overtures were entirely repulsive to her, and he made the assault and undertook to force her by a violent assault and by threats to submit to his wishes. If appellant was notified, as he claims, by these witnesses that he would be welcome to her embraces when he reached her home, and found that such was not the case, then all excuse afforded him by the statements of these absent witnesses would not justify or extenuate his subsequent course, and we might say further, in the light of this record, we are impressed with the idea that this absent testimony is not probably true. We do not believe, in view of this record, that the court was in error in refusing the continuance.

It is contended that the court erred in not charging aggravated assault. Under the testimony, we are of opinion there is no merit in this contention. Appellant was under 21 years of age, the evidence being that he was about 18 or 19. It was not, therefore, the assault of an adult male upon a female, but was the assault of a minor upon a female. The court did give in charge the law of simple assault. The jury convicted of assault to rape. The details of the assault are not set out, as it is deemed unnecessary. If the woman testified the truth, it was a fully satisfactory case where force and threats constitute the case.

There were some expressions used by one of the prosecuting attorneys that ought not to have been used, but the court charged the jury to disregard these remarks and withdrew them from the consideration of the jury. They are not of sufficient importance, in view of the charges, to require a reversal of the judgment.

There is another bill of exceptions which recites that the prosecuting witness testified that defendant made an assault upon her and

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gave the particulars of same as set forth in the statement of facts, and she got out of the house and ran and went to Miss Daisey's and told Miss Daisey all about it, and asked her what she, prosecuting witness, should do. The witness was then asked by State's counsel where she and Miss Daisey went, and she answered they 'phoned the sheriff first. This latter matter was objected to as not binding on the defendant, and as being immaterial. The same bill recites that "the officer 'phoned to was Bernard Taylor. He was justice of the peace I suppose. He is an officer. I called on him for help." And the further objection was urged that this was after the witness had reported the matter to Miss Daisey that she called up Taylor. This bill of exceptions is very general, and hardly sufficient perhaps to bring the matter in review, but concede the bill is sufficient, this happened in a very few moments after the alleged assault, and we think was within the rule laid down by the decisions that she made complaint, and was, therefore, not objectionable.

Another bill recites that Miss Daisey Mays testified: "I remember the occasion of the defendant Tom Fuller being arrested for assault on Janie Mays. I first saw Janie Mays that evening coming down there close to the road, coming in a run." Witness was then asked by State's counsel: "What did she, Janie Mays, do or say when she got to where you were?" This was objected to as to what Janie Mays said. "Q. You need not state that. State whether or not she reported anything to you that had happened to her. You need not state what it was. Did Miss Janie Mays report to you or tell you about the assault that Tom Fuller made on her? The court: He asked you, did she make any complaint to you, without telling what it was? A. Yes, sir, she did. State's counsel: I would like to ask, Your Honor, if it was concerning Tom Fuller. Defendant's counsel: The court holds that is improper. State's counsel: We think it is part of the res gestæ. The court: I will let her answer concerning Tom Fuller. Defendant's counsel: We object to that because not in the presence of the defendant, and is a self-serving declaration, and is wholly inadmissible and does not tend to prove any issue in this case, and is calculated to prejudice the rights of the defendant. My objection is, as to naming the defendant." The witness was further asked to state whether or not she made any report concerning Tom Fuller. "A. Yes, sir; just as quick as she came in and sat down." Under our decision we are of opinion there was no error in this ruling of the court. This all occurred in a few minutes. The girl had not gone more than a quarter of a mile, and we think this was brought within the rules of res gestæ, if necessary to go that far in holding the statements legitimate, but whether it was or not, this was the first person she had seen, and she made an outcry and ran hurried to Miss Daisey Mays after escaping from the defendant. We think this testimony was admissible.

The judgment is affirmed. *Affirmed.*

[Rehearing denied March 26, 1913.—Reporter.]

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MONROE McKELVEY V. STATE.

No. 2311. Decided March 5, 1913.

Rehearing denied April 16, 1913.

1.—Murder—Indictment—Date Figures.

Where the date of the indictment was written so that it was clearly discernible as to what figure was intended in stating the date, there was no error.

2.—Same—Continuance—Witnesses—Immaterial Testimony.

Where the alleged absent testimony was contrary to the testimony of other eyewitnesses to the transaction, and others who were in attendance at court and could have testified thereto were not introduced, there was no error in overruling the motion for continuance; besides, some of the testimony was entirely immaterial.

3.—Same—Evidence—Witnesses—Other Offenses.

Where defendant sought a continuance or postponement of the case until other parties could be tried who were indicted for separate and distinct offenses, and who could have been introduced as witnesses before they were tried, there was no error in overruling the motion.

4.—Same—Evidence—Declarations of Third Party—Res Gestae.

Where, upon trial of murder, the State was permitted to introduce a declaration by a third party asking why the defendant had committed the act, to which he made no reply, and which was said in his hearing and threw light on the transaction, being made just thereafter, there was no error. Following Ryan v. State, 64 Texas Crim. Rep., 628, and other cases.

5.—Same—Evidence—Remarks by Court—Conduct of District Attorney.

Upon trial of murder, there was no error in the remarks by the court to defendant's counsel that if they knew of any improper conduct by the district attorney they could prove it, but would not be allowed to take the time of the court by fishing around to see what they could prove.

6.—Same—Jury and Jury Law—Challenge.

Where seven men had been selected and sworn as jurors, the district attorney, during an intermission, was informed that one of them had formed and expressed an opinion to which he called the attention of the court, who retired the other six jurors and investigated the matter, and the juror was then accepted by both parties after the court had stated he would sustain the peremptory challenge, there was no error.

7.—Same—Evidence—Threats.

Where, upon trial of murder, the declarations of the defendant showed that he referred to deceased when he made the threat that he was going to kill someone, there was no error in admitting same in evidence. Following Godwin v. State, 38 Texas Crim. Rep., 466.

8.—Same—Evidence—Self-serving Declarations.

Where, upon trial of murder, the declarations of the defendant after the homicide showed calmness and deliberation and were not the events speaking through the defendant, the same was self-serving and inadmissible in evidence; besides, the same was contradictory of his testimony, and if error, was harmless.

9.—Same—Charge of Court—Manslaughter—Adequate Cause.

Where, upon trial of murder, the court, in submitting a charge on manslaughter, properly instructed the jury as to what would constitute adequate cause under the evidence, there was no error.

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10.—Same—Charge of Court—Self-Defense—Invited Error.

Where the court's charge on self-defense was peculiarly applicable to the facts, and a virtual copy of defendant's charge, there was no error. Following Cornwell v. State, 61 Texas Crim. Rep., 122.

11.—Same—Charge of Court—Verdict by Lot—Words and Phrases.

Where the court instructed the jury that they could not reach a verdict by lot or chance, etc., defendant's contention that he should have instructed the jury that if they found defendant guilty, they could not arrive at a verdict by lot, etc., was untenable, and the court's charge was not on the weight of the evidence when read in connection with other portions of the charge.

Appeal from the District Court of Bell. Tried below before the Hon. John D. Robinson.

Appeal from a conviction of murder in the first degree; penalty, imprisonment for life in the penitentiary.

The opinion states the case.

A. W. Gibson and *James F. Hair,* for appellant.—On question of not permitting other defendants who were indicted for other and distinct offenses to testify: Doughty v. State, 18 Texas Crim. App., 179; Bennett v. State, 47 Texas Crim. Rep., 52 Dodson v. State, 52 id., 247.

On question of admitting declarations of third party: Felder v. State, 23 Texas Crim. App., 477; Bookser v. State, 26 id., 593.

On question of challenge of juror: McCampbell v. State, 37 Texas Crim. Rep., 607; Brown v. State, 38 Texas, 483; Sterling v. State, 15 Texas Crim. App., 249; Wilson v. State, 18 id., 576; Grissom v. State, 4 id., 374; Early v. State, 1 id., 248.

On question of admitting threats: Maclin v. State, 65 Texas Crim. Rep., 384, 144 S. W. Rep., 951; Rogers v. State, 67 Texas Crim. Rep., 467, 149 S. W. Rep., 127; Fuller v. State, 54 Texas Crim. Rep., 454, 113 S. W. Rep., 540; Holland v. State, 55 Texas Crim. Rep., 27, 115 S. W. Rep., 48.

C. E. Lane, Assistant Attorney-General, and *John L. Ward,* District Attorney, for the State.—On question of challenging juror: Mitchell v. State, 43 Texas, 512.

On question of remarks by court: Stayton v. State, 22 S. W. Rep., 38; Chalk v. State, 32 S. W. Rep., 534.

On question of declarations of third party: Smith v. State, 90 S. W. Rep., 638; Keeton v. State, 59 Texas Crim. Rep., 316, 128 S. W. Rep., 404; Wynne v. State, 59 Texas Crim. Rep., 126, 127 S. W. Rep., 213; Kinney v. State, 65 Texas Crim. Rep., 25, 144 S. W. Rep., 257; Redman v. State, 68 Texas Crim. Rep., 149 S. W. Rep., 670.

On question of threats: Mathis v. State, 28 S. W. Rep., 817; Hilvenston v. State, 53 Texas Crim. Rep., 636, 111 S. W. Rep., 959; Godwin v. State, 43 S. W. Rep., 336; Taylor v. State, 72 S. W. Rep., 396; Armstrong v. State, 50 Texas Crim. Rep., 467, 98 S. W. Rep., 844; Marchan v. State, 75 S. W. Rep., 532.

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On question of self-serving declarations: Deneanor v. State, 58 Texas Crim. Rep., 624, 127 S. W. Rep., 202; Pryse v. State, 54 Texas Crim. Rep., 523, 113 S. W. Rep., 938; Ford v. State, 50 S. W. Rep., 350.

On question of verdict by lot: Lankster v. State, 72 S. W. Rep., 388; Hart v. State, 82 S. W. Rep., 652.

HARPER, JUDGE.—Appellant was prosecuted and convicted of murder in the first degree, and his punishment assessed at life imprisonment in the penitentiary.

The State's evidence would show that appellant was running a restaurant at Temule, and had as one of his waiters Jett Haley, a woman whose virtue was questionable, to say the least. Prior to the time she went to work for appellant as a waiter, she admits she was boarding and staying with a woman who was known as a prostitute. That while staying with this woman she was frequently visited by appellant, and was also quite as often visited by deceased. Appellant subsequently employed her in his restaurant, and she slept in the restaurant, appellant also sleeping in this building. On the day of the homicide she went from the restaurant to the home of the woman with whom she had formerly boarded; that in addition to Mrs. Gray and Jett Haley two other women were present, Minnie Nunnerly and Bessie Harris, both of whom were also of questionable virtue. During the evening deceased and some four or five other men went to this house, but at the time the homicide was committed all the men had left but deceased, who was sitting in a room with the four women. It is also shown that these people had a keg of beer, and perhaps some bottled beer, and they imbibed pretty freely. According to the women appellant appeared at the back door of Mrs. Gray's house, entered, having a drawn revolver in his hands, and asked Mrs. Gray, "Where is Jett?" and upon being informed that she was in the other room, he went into this room, and seeing deceased, shot and killed him. Jett Haley fled when she heard appellant ask Mrs. Gray where she was, and did not witness the shooting, but the other women say that deceased had begun to arise from his chair when the first shot was fired; that he had no weapon, and made no remark or demonstration, but appellant walked in and killed him, without a word being spoken by either man. Appellant testifies, and says he went to the home of Mrs. Gray in search of Jett Haley; that he asked the question Mrs. Gray says he did, but denies having any weapon in his hand at the time; that deceased was a larger and stronger man than himself, and deceased at once attacked him. To use his language, he says: "Howard got up and struck me. Struck at my face, and I dodged the lick and he struck my arm, and he grabbed me. He was a larger man than I was, and was trying to get me down on the floor. I got my gun out, and he grabbed my gun and we tussled around there a little while in the room, and the gun fired a couple of times in the

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room. I gave a big jerk, and when I jerked away from him I slipped and fell, and when he come at me again I shot him and turned round and ran out of the room." He also says he had been informed prior to this time that deceased intended to kill him. This is a sufficient statement of the facts, as the other evidence will be discussed in passing on the questions raised.

Appellant moved to quash the indictment on the ground that it charged an impossible data, the contention being that where the indictment alleges the offense to have been committed "on or about the 31st day of August, 1912," the "two" is so written that it is not clearly discernible what was intended. This contention can not be sustained. The figure "two" is plainly enough written for anyone to discern what figure was intended; in fact, is exactly like another two written in the indictment.

Appellant complains of the action of the court in overruling his application for a continuance. By one of the witnesses, Fred Wagner, he states he expects to prove that Mrs. Gray shortly after the killing hired him, Wagner, to have a beer keg taken away from her premises and hide the same. As all the witnesses testify to this keg of beer being on the premises at the time and prior to the shooting, this would not be material evidence. He further states that he expects to prove that the women, after the shooting, were intoxicated to the extent that they could not know and intelligently remember what took place. Appellant himself testified as did every other eyewitness to the transaction, and none of them so state in their testimony. The record shows that the men who were with these women just prior to the shooting, were in attendance on court and none of them introduced to prove that fact. So we are of the opinion the court was authorized to hold that if the witness was present he would not probably so testify, and if he did, it was not probably true.

Appellant also complains that at the same term of court Cecil Tosh and Peter Hawthorne were indicted by the grand jury, not for complicity in this offense, but for separate and distinct offenses, and he alleges that these indictments were obtained by the district attorney to affect their credit as witnesses. That he desired to use these two men as witnesses, and moved the court to continue his case until they had been tried for the offenses with which they were charged; that if he would not continue the case, to hear evidence and determine whether or not the men were guilty of the offense with which they were charged. Had they been indicted for complicity in this homicide, either as a principal or accomplice, our statute provides that by making the proper application their trial should have first been had. But as they were not charged with complicity in the offense for which appellant was being tried, the indictments against them did not disqualify them as witnesses, and it was not necessary to postpone this case until they were tried or hear evidence to determine whether or not they were guilty of the offense charged against them.

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While the witness Mrs. Cordie Gray was testifying she was permitted to state in answer to the question: "What did you say to the defendant just after the shooting," that she asked him, "My God, what on earth made you do that? My God, this is awful," and that appellant made no reply. Appellant does not deny in his testimony hearing this woman propound this interrogatory to him, nor that he vouchsafed any answer thereto. This was so closely connected with the shooting as to be almost if not a part of the transaction. The State was contending that appellant walked into the room and shot deceased without provocation, while appellant was contending that deceased assaulted him, licks were passed, and a scuffle was had before the shot was fired. This remark made at the time it was made threw light on the transaction, and would aid the jury in determining which theory was correct, and was properly admitted. Ryan v. State 64 Texas Crim. Rep., 628, 142 S. W. Rep., 78; LaGrone v. State, 61 Texas Crim. Rep., 170, 135 S. W. Rep., 121; Knight v. State, 64 Texas Crim. Rep., 541, 144 S. W. Rep., 967, and cases cited on page 984; Wynne v. State, 60 Texas Crim. Rep., 660, 127 S. W. Rep., 213; Kinney v. State, 65 Texas Crim. Rep., 251, 144 S. W. Rep., 257; Kelton v. State, 128 S. W. Rep., 404.

While the witness Minnie Nunnerly was testifying, on cross-examination, appellant propounded a question, to which the State objected, and in sustaining the objection the court remarked: "If you know where the improper work is, you can prove it, but you can not take the time of the court fishing around." Exceptions were reserved to the remark of the court, and in approving the bill the court states: "Counsel for the defendant had proceeded in interrogating the witness Minnie Nunnerly in regard to what they seemed to believe was improper conduct on the part of the district attorney and justice of the peace at Temple in their conduct of an ex parte examination of the witnesses and investigation into the homicide after it occurred. The court had permitted many questions by counsel for defense, but no question had elicited any improper conduct so far as this witness knew. The court had stated to counsel for defense, if there was improper conduct on the part of the officers intimidating this witness or any other witness, that they would be granted the widest opportunity in uncovering it. Many more questions were asked the witness in regard to the conduct of the officers and the court believed that nothing improper had been shown from the testimony of the witness as having been committed by the district attorney or justice of the peace in the statements taken, and investigation made by them, and when objection was made the court stated to counsel that if they knew of any improper work having been done by the district attorney and could prove it, they could do so, but that they should not take the time of the court fishing around to see what they could show by the witness." Under such circumstances the remark of the court

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presents no error, as it seems to have been elicited by the conduct of defendant's counsel.

Another bill shows that after seven men had been selected and sworn as jurors to try this case, during an intermission the district attorney was informed that one of them so selected, J. D. Allen, had formed and expressed an opinion. He called the court's attention to the matter, when at the request of counsel for the State and defendant the other six jurors were sent into an adjoining room in charge of an officer, while the juror Allen was further examined. After hearing the evidence adduced, the court stated that he would sustain a peremptory challenge to the juror if the counsel for the State or defendant desired to challenge him, when the juror was again accepted by State's and defendant's counsel, and was a member of the jury that tried appellant. This bill presents no error. The court showed extreme fairness in the matter by telling counsel he would sustain a challenge for cause if either desired to make it, and not having done so, no complaint can subsequently be made.

In another bill it is shown that Leon Wilson was in the restaurant of appellant a short time before the killing, and in a conversation with appellant, and appellant had said, "He was going to vote a negro, and in about twenty minutes he was going to kill a damned son-of-a-bitch." The testimony further shows that he immediately armed himself with the pistol that he used in slaying deceased; that in a short time he did go to the polls; that a negro was at the polls with him, and that when he left the polls, he went direct to the place of residence of Mrs. Gray, and by the State's testimony, that he walked into the room where deceased was sitting, with the pistol in his hands and deliberately killed deceased. It is true as contended by appellant, that to render threats admissible in a homicide case, our decisions have stated that the facts and circumstances must individuate the deceased as the person in regard to whom the threats were made. In this case we think the evidence offered in behalf of the State would clearly show and authorize the jury to find that appellant referred to deceased when he made the threat, and, therefore, the testimony was properly admitted. (Godwin v. State, 38 Texas Crim. Rep., 466.)

While the witness Lucias Green was testifying, the defendant proved by the witness that after the shooting was over appellant came to him and got in his buggy, and he drove appellant to the city. That while on the way to the city appellant made a statement to him in regard to the difficulty, which would be what is termed a self-serving declaration. If not res gestæ it would not be admissible, and the court sustained an objection to its admissibility. Appellant insists it was res gestæ of the transaction. The time when the statement was made by appellant to Green elapsing between the shooting and the alleged statement, is variously stated in the record, but it may be said that it was not so remote as to exclude the statement from being res gestæ

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on account of lapse of time alone. The question is, do the facts and circumstances connected therewith show that state of mind which would evidence that it was but the events speaking through appellant, or do the facts and circumstances show calmness and deliberation on the part of appellant, and that he was but speaking about the event. We think the latter is true, but if mistaken in this, the exclusion of this testimony could have not been hurtful to defendant. He himself testified, and told how the transaction occurred and if the witness Green had been permitted to testify to what he claimed appellant had told him, such statement would have contradicted appellant's testimony on the trial, and under such circumstances, in no event, do we think the exclusion of this testimony would be reversible error.

The court in his charge submitted the issues of murder in the first and second degrees, manslaughter and self-defense. In no part of the motion is complaint made of the charge of the court on murder in the first or second degree. There are several complaints that the court in his charge did not properly define "adequate cause" as applicable to the facts of this case. The court in this respect charged the jury:

"By the expression, 'adequate cause,' is meant such as would commonly produce a degree of anger, rage, resentment or terror in a person of ordinary temper sufficiently to render the mind incapable of cool reflection.

The following are deemed adequate causes: "An assault and battery by the deceased causing pain would be adequate cause, but you are further charged that all circumstances and conditions which are capable of creating and do create sudden passion, in the mind of a person of ordinary temper sufficient to render the mind incapable of cool reflection, would be adequate cause, and in the event that several of such circumstances or conditions should be found by you to exist, they should be taken together by you in determining whether adequate cause existed.

"In order to reduce a voluntary homicide to the grade of manslaughter, it is necessary not only that adequate cause existed to produce the state of mind referred to, that is, of anger, rage, sudden resentment or terror, sufficient to render it incapable of cool reflection, but also that such state of mind did actually exist at the time of the commission of the offense, and that it was produced by such adequate cause.

"Although the law provides that the provocation causing the sudden passion must arise at the time of the killing, it is your duty in determining the adequacy of the provocation (if any), to consider in connection therewith, all the facts and circumstances in evidence in the case, and if you find that, by reason thereof, the defendant's mind at the time of the killing was incapable of cool reflection, and that said facts and circumstances were sufficient to produce such state of mind, in a person of ordinary temper, then the proof as to the sufficiency of the provocation satisfies the requirements of the law, and so in this

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case you will consider all the facts and circumstances in evidence in determining the conditions of the defendant's mind at the time of the alleged killing, and the adequacy of the cause (if any) producing such condition."

This we think properly instructed the jury as to "adequate cause" under the evidence, and the complaints of these paragraphs of the court's charge are without merit.

The court's charge on self-defense was fair and peculiarly applicable to the facts in this case. The charge as given was a virtual copy of appellant's charge No. 7 requested, and under such circumstances he would not be heard to complain, for if error there be, the error was invited in requesting that this charge be given. Cornwell v. State, 61 Texas Crim. Rep., 122, 134 S. W. Rep., 221.

The only other ground in the motion for new trial we deem it necessary to discuss is the one complaining of that portion of the charge which instructs the jury they can not reach a verdict by lot or chance, etc. Appellant's contention is that the court should have instructed the jury, "If they found appellant guilty, they could not arrive at a verdict by lot or chance," etc., and by the omission of these words the charge as given was calculated to impress the jury with the belief that the court was of the opinion that appellant was guilty. It would have been better that the court had used the words "if the jury found appellant guilty" in beginning this paragraph, but when we read the charge as a whole we do not think such a construction could have been placed by the jury on this paragraph. The court not only instructed the jury as to reasonable doubt generally, but also as to reasonable doubt as between degrees of the offense, and the charge as a whole presents the case in a way that no part of it can be said to be on the weight to be given the testimony or any portion thereof, nor impress the jury that the court entertained any opinion in regard to his guilt or innocence.

The judgment is affirmed.

Affirmed.

[Rehearing denied April 16, 1913.—Reporter.]

JOE McDOWELL V. STATE.

No. 2256. Decided March 12, 1913.

Rehearing denied April 16, 1913.

1.—Pandering—Illegal Procuring—Prostitution—Indictment.

Where the indictment sufficiently charged the offense of procuring and attempting to procure or being concerned in procuring a female person to come into this State for the purpose of prostitution, the same was sufficient, and there was no error in overruling a motion to quash.

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2.—Same—Continuance.

Where the alleged absent testimony was immaterial, there was no error in overruling a motion for continuance.

3.—Same—Charge of Court—Fraud—Duress.

The law does not require that procuring shall be done by fraud, duress, etc., but intends to prohibit persons from bringing into this State women to practice prostitution, and this, although the woman may be a prostitute, and there was no error in the court's refusal of defendant's requested charge requiring that the procuring must be done by fraud, etc.

4.—Same—Bills of Exception.

In the absence of bills of exception, the court's ruling on testimony cannot be considered on appeal.

5.—Same—Charge of Court—General Objections.

General objections to the court's charge without pointing out error cannot be considered on appeal; besides, the court's charge was sufficient. Following Sue v. State, 52 Texas Crim. Rep., 122, and other cases.

6.—Same—Newly Discovered Evidence—Affidavits.

Where no affidavits were attached to the motion for new trial on account of newly discovered evidence, the same cannot be considered on appeal; besides, the contention that prosecutrix was of loose morals before coming into the State was no defense to the offense of pandering.

7.—Same—Sufficiency of the Evidence.

Where, upon trial of pandering and procuring a woman to come to this State for the purpose of prostitution, the evidence sustained the conviction, there was no error.

Appeal from the District Court of Hopkins. Tried below before the Hon. R. L. Porter.

Appeal from a conviction of pandering; penalty, five years imprisonment in the penitentiary.

The opinion states the case.

The indictment, omitting formal parts, charged that the defendant did then and there unlawfully in the State of Arkansas, procure one Gertrude McDaniel, a female person, to come from the State of Arkansas into the State of Texas and County of Hopkins in said State of Texas, for the purpose of prostitution on the part of her, the said Gertrude McDaniel, against the peace and dignity of the State.

H. C. Connor, for appellant.—On question of insufficiency of indictment: Morris v. State, 13 Texas Crim. App., 65; Woolsey v. State, 14 id., 57; Article 564, White's Criminal Procedure.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—The prosecuting witness in this case testified: "My name is Gertrude McDaniel. I am married, was married in July two years ago. My maiden name was Walker. Prior to my marriage I lived with my father and mother at Dangerfield, Texas. I was raised there but not born there. My husband's name is Conner McDaniel. After I married I continued to live at Dangerfield until last July,

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was a year ago. We moved from Dangerfield to DeQueen, Arkansas, where my husband worked in a livery barn. I know the defendant, Joe McDowell, and have known him since last Christmas. I first met him at DeQueen. When I first met the defendant my husband and I were living together at DeQueen, staying at Freeman's private boarding house. The defendant was working at a restaurant when I first met him and my husband was working at a livery barn. My husband and I separated some time in May of this year. We were living at DeQueen and staying at the Grabel Hotel when we separated. The defendant was living with his sister at that time. I had not been thrown with the defendant to any considerable extent before me and my husband separated. I had not had carnal intercourse with the defendant at the time me and my husband separated. After our separation the defendant and I continued to stay at the hotel. No one got me to stay there; the defendant told me that if I would stay he would pay my board. I stayed there about three weeks and he paid my board. He had carnal intercourse with me during this time. I came to Texas some time in July of this year from DeQueen, Ark., and the defendant came with me. After I came to Texas I followed the business of having carnal intercourse with men. We first went to my father's and mother's home at Petty, Texas, where we stayed a day and night, we then went to Paris, Texas, the defendant and I. I had intercourse with ten or fifteen men at Paris, Texas. The cabman would go and get them for me and take me out into the country. From Paris I went to Whiteboro and the defendant went with me. I had intercourse with four or five men at Whiteboro. I went from Whiteboro to Texarkana and the defendant went with me. I had carnal intercourse with two men at Texarkana. The defendant and I occupied the same room at the K. C. S. Rooming House at Texarkana. We went from there to Mt. Pleasant. I had intercourse with eight or ten men at Mt. Pleasant. The defendant and I came from Mt. Pleasant to Sulphur Springs; we got here about the 11th day of August of this year. I came to Sulphur Springs for the same purpose that I had been doing. We first put up at the McClimmons House; we got there Saturday night and stayed there until the following Monday morning. The defendant and I occupied the same room at the McClimmons House. We went from the McClimmons House to the Gaines Boarding House, occupying the same room from Monday until Wednesday, when we were arrested. I did not have intercourse with men in Sulphur Springs. I was unwell during that time. I had made arrangements to meet one man here on Wednesday night. For the acts of intercourse at different places in Texas, I charged the men two dollars each. I got a letter from mama about a week before we left DeQueen to come to Texas. During that time the defendant talked to me at different times about coming to Texas and doing that line of business. The defendant came with me to Texas; we took the train at DeQueen and came to Petty. We were on the same train; we changed cars at

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Texarkana. Q. Did he have any conversation on the train with you coming from DeQueen, Ark., to Texarkana about coming to Texas and following the life of a prostitute? A. If I did not want to stay at home. He told me I could make two or three hundred dollars a month at that business. I asked him how much to charge and he said not less than two dollars. I promised that I would go with him and follow the life of a prostitute. He was to rustle a part of the trade for me and send parties to me. He sent men to me two or three times. We did not intend to divide the money but use it as we needed it. I paid the expenses of these different trips and gave him money I had been making in this manner. When I came to Texas I stayed one night with my mother and then went out in this line of business and continued to follow it until I was arrested in Sulphur Springs on Wednesday. I came to Sulphur Springs to follow that business."

Our statute provides that if any one shall procure, attempt to procure, or be concerned in procuring any female person to come into this State for the purpose of prostitution, he shall be deemed guilty of a felony, and be punished by confinement in the penitentiary for any term of years not less than five. The indictment sufficiently charges the offense, and the court did not err in overruling the motion to quash the indictment. (Acts 32d Leg., Chap. 23, p. 29, Art. 441, Code of Crim. Proc., and sec. 347 White's Ann. Proc.)

There was no error in overruling the application for a continuance, as the fact that the prosecuting witness received $5.50 from her father just before leaving DeQueen is a fact shown by the evidence to be undisputed. That the witness often talked of coming to Texas is also a fact not disputed in the record. Consequently none of the testimony would have been material on the trial.

The special charge requested insofar as it is the law was covered by the court's main charge. The law does not require that procuring shall be done by fraud, duress, etc. The law intends to prohibit persons from bringing into this State women to practice prostitution, and to do so, although the woman may be a prostitute. If one should procure an innocent female by fraud or duress to come into this State with that end in view, doubtless a jury would inflict a more heavy penalty than where the woman was already a prostitute, but the object and purpose of the law is to prohibit the bringing of any and all class of females into this State to practice that vocation.

Those grounds in the motion for new trial complaining of the introduction and rejection of testimony can not be considered, as no bills of exception were reserved, if any such objections were made during the trial of the case.

Those grounds in the motion for new trial which set out certain paragraphs of the charge, and then stating: "the court erred in giving same because the same is incorrect in law and is not applicable to the evidence," are too general to be considered. No error is pointed out in the charge, if error there be. (Sue v. State, 52 Texas Crim.

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Rep., 122.) However, we have read the charge of the court and he aptly applies the law to the evidence, and in the charge instructed the jury:

"If you have a reasonable doubt as to whether the defendant procured the said Gertrude McDaniel to come into the State of Texas for the purpose of prostitution; or if you have a reasonable doubt as to whether the defendant procured the said Gertrude McDaniel to come into the County of Hopkins, in said State of Texas, for the purposes of prostitution; or if you have a reasonable doubt as to the defendant's guilt, you will acquit him.

"In all criminal cases the defendant is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt, and the burden of proof is on the State throughout the trial and never shifts to the defendant, and in case you have a reasonable doubt as to the defendant's guilt, you will acquit him."

This aptly presented the defense of appellant, and the court in the remaining portions of the charge defined the offense, and correctly instructed the jury under what conditions they would be authorized to convict.

There is no merit in that portion of the motion alleging newly discovered evidence. It would be no defense to show that she was a woman of loose morals before coming into this State. She admits it in her testimony. Our decisions all hold that where newly discovered testimony is relied on to secure a new trial, the application must be accompanied by the affidavit of the newly discovered witness or witnesses, or good cause be shown why this is not done. No affidavits are attached to the motion, and no reason stated why this is not done. Consequently, this ground presents no question in a way we can consider it. (Love v. State, 3 Texas Crim. App., 501; Cotton v. State, 4 Texas, 260; Evans v. State, 6 Texas Crim. App., 513.)

Appellant seems to have proceeded on the theory that if the prosecuting witness was an immoral woman before she came to Texas, it would be no offense to procure her to come into this State to ply her vocation. This is not the law. As it is shown that she came into this State to ply this vocation, and with appellant's aid and assistance she visited a number of towns and cities and in each of them she would sell her person to such persons as appellant might send to her, they living off the proceeds, we think the evidence is sufficient, and the judgment is affirmed.

Affirmed.

[Rehearing denied, April 16, 1913.—Reporter.]

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J. H. Green v. State.

No. 2347. Decided March 12, 1913.

Local Option—Law in Force.

Where the record did not show that local option was in effect in the territory where the alleged violation of the law occurred, the same is reversible error.

Appeal from the County Court of Matagorda. Tried below before the Hon. W. S. Holman.

Appeal from a conviction of a violation of the local option law; penalty, a fine of $100 and sixty days confinement in the county jail.

The opinion states the case.

Linn, Conger & Austin, for appellant.

C. E. Lane, Assistant Attorney-General, for the State. Cited Poudrill v. State, 61 Texas Crim. Rep., 431.

DAVIDSON, Presiding Judge.—Appellant was convicted of violating the local option law.

There are some questions of more or less moment in the case, but inasmuch as the record does not show that the local option law was in force and effect in Matagorda County, this conviction can not be sustained. It is necessary under the law of this State, and the decisions of this court, that it be shown by the record that local option law was in effect in the territory where the alleged sale occurred in violation of said law; otherwise, the law could not be violated. It is unnecessary to discuss this question. It has been so often decided that authorities are not necessary.

The judgment is reversed and the cause remanded.

Reversed and remanded.

J. S. Kelly v. State.

No. 2369. Decided March 12, 1913.

Bigamy—Statement of Facts—Security—Costs—Practice on Appeal.

Where, upon appeal from a conviction of bigamy, the record showed that defendant, in his motion and affidavit, did not allege that he was not able to give security for the cost of making out a transcript as provided under section 8, Act of March 31, 1911, p. 264, his contention that the case should be reversed because he was not furnished a statement of facts free of any cost to him, and without his giving security therefor, is untenable and the cause must be affirmed in the absence of a statement of facts.

Appeal from the District Court of Houston. Tried below before the Hon. B. H. Gardner.

Appeal from a conviction of bigamy; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

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Adams & Young, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—Appellant was convicted of bigamy and his penalty fixed at the lowest prescribed by law.

There is no statement of facts. However, appellant has one contention in the case and presents one question necessary to review, and that is, he claims that the case should be reversed because he was not furnished a statement of facts free of any cost to him and without his giving security therefor.

The record shows that after the conviction and after the overruling of his motion for new trial he filed a motion, which he swore to, requesting the court to require the official stenographer to make him out a statements of facts, in which he set up that when his motion for new trial was overruled and he gave notice of appeal the court heard testimony as to his ability to make an appeal bond pending the appeal, and after hearing such evidence fixed appellant's appeal bond at $2,500. This evidence is not contained in the record, nor is it in any way shown by appellant's bill of exceptions to the overruling of his said motion, nor does the record show whether or not he made the appeal bond. The inference is that he did, but whether he did or not is immaterial. His motion and his bill show as follows: "That the amount of said bond (appeal bond at $2500) in the opinion of this defendant is excessive, and it is doubtful whether this defendant will probably be required to remain in jail until his said appeal can be passed upon by the said Court of Criminal Appeals; that this defendant owns no property of any kind; that he owns no personal property except his wearing apparel and owns no real estate at all, and this defendant has in actual money less than one dollar, and he has no debts due and owing him; that the only possible chance for this defendant to pay for said statement of facts in the above styled and numbered cause will be for defendant to be released from jail and secure some kind of employment out of the proceeds of which he can pay for the said statement of facts; that this defendant has no friends, so far as he knows or believes, who will furnish the money with which to pay for said statement of facts, and this defendant knows no source from which he can secure the money to pay for the same except if he should succeed in making the said bond he might possibly be able to make by manual labor the amount which said statement of facts will cost.

"Wherefore this defendant prays the court to enter an order requiring a statement of the facts in this case to be made by the stenographer of this court without this defendant being required to pay for the same."

The court in approving this bill to the overruling of appellant's said motion, qualified it thus: "When this motion was presented the court called the attention of the attorneys for defendant to the fact

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that the affidavit did not say that defendant was 'not able to give security' for the cost of making the statement of facts and suggested that the affidavit could be amended to that effect and defendant re-sworn to it, and if that was done the motion would be granted; the attorney after reading over the affidavit stated he believed the court was right but that he would stand on the motion and affidavit as made; thereupon the motion was overruled after specially calling attention of attorney to the wording of the statute.

"The defendant is a white man and a preacher and I fixed his appeal bond after hearing his evidence as to the financial ability of his friends and proposed bondsmen."

The articles of the statute to which the court called appellant's attention at the time, as shown by his qualification, are sections 5 and 8 of the Act of March 31, 1911, page 264. Sec. 5, in substance, provides that when an appeal is perfected the official shorthand reporter shall transcribe the testimony introduced on the trial for which he shall be paid 15 cents per folio of 100 words, "said transcript to be paid for, by the party ordering the same, on delivery." Sec. 8 provides that when any criminal case is appealed and the defendant "is not able to pay for a transcript, as provided for in section 5 of this act, *or to give security therefor,* he may make affidavit of such fact, and upon the making and filing of such affidavit the court shall order the stenographer to make such transcript in duplicate and deliver it, as herein provided in civil cases, but the stenographer shall receive no pay for same; provided, that should any such affidavit so made by such defendant be false, he shall be prosecuted and punished as now provided by law for making false affidavits." In appellant's said motion he does not state that he was not able "to give security for the cost" of said work of the stenographer, nor does his affidavit as a whole, in substance or effect, so state. Doubtless the latter part of section 8, above quoted, wherein it is prescribed that "should any such affidavit so made by such defendant be false, he shall be prosecuted and punished as now provided by law for making false affidavits," deterred and prevented him from making the said affidavit. If it was a fact that he was unable to give security for cost, when the court told him that if he would so make an affidavit the motion would be granted, and he declined to do so, he alone is responsible for not getting a statement of facts, and can not take advantage of his own wrong.

The judgment is affirmed.

Affirmed.

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LEE LAIRD v. STATE.

No. 2219. Decided March 12, 1913.

Rehearing denied April 2, 1913.

1.—Disturbing Religious Worship—Charge of Court—Willful.

Where, upon trial of unlawfully and willfully disturbing a congregation assembled for religious worship, the charge of the court, although inaptly worded, sufficiently informed the jury that the act of the defendant must have been willfully done, there was no error.

2.—Same—Charge of Court—Words and Phrases.

Upon trial of unlawfully and willfully disturbing religious worship, there was no error on the ground that the information used the words "religious worship" and the charge of the court, the words, "religious purposes." Following Yarborough v. State, 19 Texas, 162.

3.—Same—Requested Charge—Immaterial Matter.

Where, upon trial of unlawfully and willfully disturbing religious worship, the evidence showed that defendant was one of the men who rode by the church window and threw a jug through the window, it was immaterial whether he rode a horse, a mule, or was walking, and there was no error in the court's failure to submit a requested charge that if defendant was riding a mule, to acquit him.

4.—Same—Requested Charge—Congregation—Religious Worship.

Where people had gathered at a church for religious worship, and it afterwards turned out that the minister had not undertaken to hold such worship, they were, nevertheless, protected under the law from an unlawful and willful disturbance. Following Yarborough v. State, 19 Texas, 162.

5.—Same—Requested Charge—Knowledge of Defendant.

Where the evidence showed that defendant, who was charged with throwing a jug through a church window, had knowledge that people were assembled there for the purpose of religious worship, there was no error in refusing a requested charge that if defendant had no notice that people were having religious services there to acquit him.

6.—Same—Sufficiency of the Evidence.

Where, upon trial of unlawfully and willfully disturbing religious worship, the evidence sustained the conviction, there was no error.

7.—Same—Newly Discovered Evidence—Affidavit.

Where the alleged newly discovered evidence was not of that character which authorized a new trial and the motion was not supported by affidavit, there was no error.

8.—Same—Evidence—Practice on Appeal.

Where, upon appeal it is shown by the record that the testimony objected to was excluded, there was nothing to review on that ground.

9.—Same—Charge of Court—Circumstantial Evidence—Juxtaposition.

Where criminative facts established are in such close juxtaposition to the main facts as to make them almost equivalent to direct testimony, the court is not required to charge on circumstantial evidence.

Appeal from the County Court of Tyler. Tried below before the Hon. R. A. Shivers.

Appeal from a conviction of unlawfully and willfully disturbing religious worship; penalty, a fine of $25.

The opinion states the case.

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Joe. W. Thomas, for appellant.—On question of other party committing offense: Hall v. State, 153 S. W. Rep., 902.

On question of the court's charge on the word willfully: Harvey v. State, 44 S. W. Rep., 151; Prucell v. State, 19 S. W. Rep., 605; Green v. State, 56 S. W. Rep., 915; Wood v. State, 16 Texas Crim. App., 574.

On question of court's refusal of requested charge: Meuly v. State, 26 Texas Crim. App., 274; Jones v. State, 33 Texas Crim. Rep., 492; Clay v. State, 65 Texas Crim. Rep., 402, 144 S. W. Rep., 280.

On question of circumstantial evidence: Hyden v. State, 31 Texas Crim. Rep., 401; Robertson v. State, 33 id., 366.

C. E. Lane, Assistant Attorney-General, for the State.—Cited cases in opinion.

HARPER, JUDGE.—Appellant was convicted in the County Court of Tyler County, of unlawfully and willfully disturbing a congregation assembled for religious worship, and his punishment was assessed at a fine of $25.

The evidence is undisputed that some six or seven parties had assembled at the Cherokee Methodist Church in Tyler County for the purpose of attending preaching, but that there was no preaching there that night; that they assembled there thinking that there would be, but that they were laboring under a misapprehension. Several of the witnesses testify that they saw appellant and Bob Haynes just before the jug was thrown in the window of the church; that they were riding by and came within four feet of the window.

Appellant makes several objections to the charge of the court, also insisting that the evidence was insufficient, that a new trial should have been granted on the ground of newly discovered testimony, and that certain testimony was improperly admitted in evidence.

Appellant insists that the court erred in refusing to give his special charge No. 3, instructing the jury as to what is meant by "willful." It is also contended that the court erred in failing to instruct the jury that the act must have been "willfully" done, etc. The court instructed the jury that "if you believe beyond a reasonable doubt that the defendant *committed the offense* or acted in conjunction with Bob Haynes *in committing the offense,* you will find him guilty, etc." However, at the beginning of his charge, the court instructs the jury that the defendant is charged "with the offense of disturbing a congregation then and there assembled for religious worship by unlawfully and *willfully* throwing a jug through the window, etc." And then proceeds to charge the jury as to the meaning of *willful* in the following language: "You are charged that by the term willful, is meant with willful intent or without reasonable grounds to believe the act to be lawful." From the above it will be seen that the law requires, and the information charges, that the disturbing of the congregation be willfully done. The court instructs the jury that the defendant stands charged with unlawfully disturbing a congregation by willfully

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throwing a jug in at a window. To say one disturbed a congregation by unlawfully and willfully throwing a jug in at a window and that he unlawfully and willfully disturbed a congregation by throwing a jug in at a window, mean practically the same. The throwing of the jug in at the window was the means used to disturb the congregation, and if the throwing was willfully done, the disturbing of the congregation was consequently willfully done. The charge may be inaptly worded but it sufficiently informed the jury that the act must have been willfully done.

Appellant complains of the charge of the court in this, towit: the information alleges the congregation had assembled for religious *worship,* while the charge uses the words "religious purposes." The objection to this charge is not definite enough to require the review of this court, but should we do so, this variance is immaterial. In Yarborough v. State, 19 Texas 162, it was held that the allegation that the congregation "were attending a protracted or other religious meeting" was equivalent to an allegation that they were assembled for religious worship.

Appellant insists that the court erred in refusing his special charge to the effect that if the jury find that the parties, or either of them, who threw the jug in at the window, etc., was riding a mule, to find the defendant not guilty. The information does not allege that the parties who committed the offense were riding horses, or that they were riding at all, but simply alleges they unlawfully and willfully disturbed the congregation, etc., by throwing a jug through the window. Most of the witnesses testified that they were riding horses, but some of them testified that one was riding a horse and the other a mule. Whether appellant was riding a horse or mule, or was walking, would make no difference, and it would have been improper to predicate his conviction upon whether or not he was riding a horse. Mrs. Lillian Davis positively identifies him as one of the men who rode by the window when the jug was thrown.

Appellant next insists that the court erred in refusing his special charge instructing the jury what constituted a congregation assembled for religious worship, and submitting the issue as to whether or not the congregation in question was such. The evidence shows that it had been rumored around in the neighborhood that there would be preaching at this particular church that night, but that the rumor was a false one and the preacher undertook to correct it. However, those who gathered at the church had never heard the rumor corrected and were under the impression that there would be preaching, and went to the church to attend divine services. In Yarbrough v. State, 19 Texas, 162, it was held, "* * * it was not necessary to charge that the congregation was engaged at the time in any religious service or ceremony, or had commenced such service or ceremony at the time of the disturbance; it was sufficient to charge that the congregation was assembled for religious worship * * *"

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The next assignment insists that the court erred in refusing appellant's special charge to the effect that if the jury find that the church was not lighted and no services was going on and nothing to put the parties who threw the jug in at the window on notice that they were having religious services there, then to find him not guilty. The evidence would clearly indicate that appellant, if he threw the jug; knew that these people were assembled there, and the purpose for which they had gathered; therefore the court did not err in refusing the charge.

It is next insisted that the evidence was insufficient. There is no merit in this contention. The evidence was amply sufficient upon which to base a verdict of guilty. Mrs. Davis testified: "I was at the Cherokee Methodist Church in Tyler County, Texas, on the Saturday night, November 3rd, 1911, when the jug was thrown through the window. I know who did it, the parties were Lee Laird, defendant, and Bob Haynes, for I saw them within about four feet of that window in which the jug was thrown. I recognized them both and knew them. They were riding, Bob Haynes was riding Lee Laird's grey horse and Lee Laird was riding Bob Haynes' sorrel horse with white stocking feet. They came up riding fast, passed by and afterwards returned. I was standing on the ground at the east end by the steps. This occurred in Tyler County, Texas, on the night of November 3rd, 1911; we were congregated there for the purpose of attending preaching."

It is also insisted that the court erred in not granting appellant a new trial on account of certain newly discovered evidence. This newly discovered evidence was not of that nature to authorize a new trial. Besides, there is no proof as to the newly discovered testimony and no reason stated why affidavits were not procured. See Section 1149 White's Code of Criminal Procedure, subdivision 10.

It is also insisted that the court erred in admitting certain evidence of Arthur Barnes that he "took the horses to be Bob Haynes' and Lee Laird's." This testimony was excluded by the court, and the jury instructed not to consider it.

The only remaining assignment is that the court erred in not charging on circumstantial evidence. While no one testified that they saw the appellant or any one throw the jug in at the window, still several of the witnesses testified that they saw the appellant and Haynes within four feet of the window riding by, just at the time the jug was thrown in at the window. Under this state of facts, it was not necessary to charge on circumstantial evidence. Where criminative facts established are in such close juxtaposition to the main fact as to make them almost equivalent to direct testimony, the court is not required to charge on circumstantial evidence. See White's Code Criminal Procedure, Sec. 813, sub-division 3 for authorities.

The judgment is affirmed.

Affirmed.

[Rehearing denied April 2, 1913.—Reporter.]

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JOE GUSEMANO V. STATE.

No. 2345. Decided March 12, 1913.

1.—Burglary—Evidence—Accomplice—Corroboration—Impeachment.

Upon trial of burglary, where it developed that the case against the State's witness for a similar offense had been dismissed, it was error to permit the State to show that the State's witness had substantially testified in the Justice Court as he did on the trial, such estimony was not admissible either for the purpose of corroboration or impeachment. Harper, Judge, and Prendergast, Judge, dissenting.

2.—Same—Evidence—Supporting Testimony—Rule Stated.

Where it was sought to be shown that the State's witness had testified under an agreement that he would not be prosecuted for the offense, this would be an effort to show a corrupt motive, and it was, therefore, permissible to admit testimony that the witness had made similar statements before the justice of the peace. Davidson, Presiding Judge, dissenting.

3.—Same—Charge of Court—Recent Possession—Explanation—Exculpatory Evidence.

Where, upon trial of burglary, there was evidence of defendant's explanation of his possession of the alleged stolen property, which was introduced by the State, it was reversible error to charge the jury that they must find that defendant's explanation was consistent with his innocence, as he may have received it, knowing that it was stolen property and yet, was not guilty of the burglary.

Appeal from the Criminal District Court of Harris. Tried below before the Hon. C. W. Robinson.

Appeal from a conviction of burglary; penalty, two years imprisonment in the penitentiary.

The following statement from the Assistant Attorney-General is substantially correct:

On one of the nights early in May a railway car in the possession of one Bush was broken open and considerable merchandise taken therefrom. The officers were notified of this burglary and by daylight the next morning they had traced a wagon from the place where the car was burglarized to the store of appellant. The goods stolen consisted largely of shoes wrapped with a peculiar kind of paper. These officers testified that they found some of this paper where the car had been burglarized and after tracing the wagon to appellant's store they found some of the identical kind of paper in the back yard of appellant where he ran his small store. A short while after this burglary Sol Parker, John Parker, Joe Lewis, Walter Moore, Arthur Pitman (negroes), Nick Tremonte, V. Danna, and appellant Joe Gusemano were charged or rather suspicioned of having committed this burglary. The first five named, negroes, were arrested. In a short while after the burglary the officers sent for appellant to come to the police station. He came there and was then told by the officers and also by a relative through the advice of the officers that if he had these goods he should give them up and that they would do all that they could for him if he would do the right thing. Appellant then made a statement that he had bought these goods from these negroes

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and that he had sent the goods out to the country, as he did not want them discovered in his possession. He then proceeded to get the goods, about two wagon loads, and delivered them to the officers. The negro Sol Parker, an accomplice, testified in behalf of the State that this appellant, together with the parties above named, assisted in the burglarizing of the car.

E. T. Branch, for appellant.—On question of admitting testimony as to statement of accomplice made before the justice of the peace in the absence of defendant: Pridemore v. State, 53 Texas Crim. Rep., 620; Saye v. State, 54 id., 430; Ezell v. State, 65 S. W. Rep., 370, and cases cited in opinion.

On question that witness can not be bolstered up by proof of similar statements after inducement existed: Porter v. State, 50 S. W. Rep., 380; Morton v. State, 71 S. W. Rep., 281; Sanders v. State, 31 Texas Crim. Rep., 525; Conway v. State, 33 id., 327; Green v. State, 49 id., 238; Anderson v. State, 50 id., 134; Branch Crim. Law, Section 364.

On question of exculpatory evidence and State being bound thereby: Winkler v. State, 58 Texas Crim. Rep., 564; Banks v. State, 56 Texas Crim. Rep., 262; Bryan v. State, 54 id., 59.

On question of reasonable explanation: Cagle v. State, 52 Texas Crim. Rep., 307; Section 772, Branch Crim. Law.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was convicted of the burglary of a railroad car. There was evidence of the fact that the car was broken and goods taken from it. The State introduced a negro named Parker, who made himself an accomplice,—that is a principal, in the transaction of breaking the car and taking the goods. Under his testimony the State would have a case, but being an accomplice and used as a witness, it was necessary that he be corroborated as required by the statute. As a means of corroboration of the negro, the State used an officer as a witness who testified in substance that appellant returned some of the property to him. Either at the time when appellant was first questioned about the goods, or when he delivered them, or perhaps on both occasions, he stated that he had purchased the goods from five negroes. The witness Parker had testified that five negroes, including himself and the defendant, who is not a negro, had committed the burglary, appellant furnishing the wagon. Appellant also proved an alibi on the night of the burglary. Without going into a detailed statement of the facts, this, we think, is sufficient to bring in review the questions presented.

1. Parker, on cross-examination, testified that he had made substantially the same statement before the justice of the peace or magistrate about two weeks after the burglary that he made on the trial

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before the jury. The details are unnecessary. Objection was urged to this testimony and various grounds presented. This testimony was not admissible. We suppose the court admitted it upon one of two, or perhaps both, grounds,—first, that it was corroborative of the accomplice's testimony given before the jury, and, second, that he had been impeached, or sought to be impeached. Neither ground justified the admission of this testimony. Parker stated that he had made practically the same statement with reference to the transaction before the magistrate about two weeks after the alleged burglary. He was not sought to be impeached. It was developed from him while he was testifying, that the State would dismiss or had dismissed one of the cases against him. The court's ruling seems to be predicated upon the theory that that was impeaching the witness. We do not so understand the law. If it was sought to corroborate the accomplice by a repetition of his statement made at some other time, that can not be done. An accomplice can not corroborate himself. It is immaterial how many statements he may make. Without going into a discussion further of this matter, we refer to Pridemore v. State, 53 Texas Crim. Rep., 620; Saye v. State, 54 Texas Crim. Rep., 430; Reese v. State, 43 Texas Crim. Rep., 539; and Morton v. State, 43 Texas Crim. Rep., 533, 71 S. W. Rep., 281. We deem it unnecessary to pursue this line of thought further. To show a dismissal of the case against Parker was not impeaching his testimony.

2. Complaint is made of the court in charging upon the subject of reasonable explanation and possession of property because the State had proved the explanation and was bound by it, unless it was shown to be untrue, and the explanation being proved by the State, was a different question from the explanation put in evidence by the defendant, and because the reasonableness of the explanation was not a question for the jury, having been proved by the State, and because the court also required the jury to find that the explanation was "consistent with his innocence." The court tried this case upon the theory that appellant's explanation of his possession of the property, towit; that he bought it, was consistent with his innocence. This question came up in Cagle v. State, 52 Texas Crim. Rep., 307, and was held adversely to the court's ruling. Applied to the facts of this case, the charge on explanation of possession of stolen property did not present the question as it should be presented, and, in fact, it may be stated that the charge as given, was detrimental to appellant. The charge with reference to reasonable explanation of the possession of property is based upon the theory that he came by the property innocently. That may not have been the case under this record. Appellant is charged with burglary and not with theft. The State put in evidence the fact of his possession, accompanied by his statement to the effect that he purchased the property. If appellant purchased the property, he would not be guilty of burglary. The property might not have been innocently in his possession. He may have

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bought the property knowing it to have been stolen and yet be entirely innocent of burglary. Of course, if he bought the property,—whether he bought it innocently or knowing it to have been stolen,—this might be used as a circumstance for what it was worth, but if he bought it knowing it to have been stolen, he would not have been innocent in his possession. It would still have been a guilty possession if he knew it was stolen when he made the purchase. To meet this appellant requested some special charges; not only so, but criticised the court's charge in the motion for new trial. These special requested instructions were refused. The effect of these charges was to place this matter more correctly before the jury,—that is, if the defendant bought the property, even if he knew it was stolen, yet, before they could convict him of burglary, they must find that he was present or doing something in connection with the burglary which made him a principal. His acquittal of the burglary would not depend upon his innocence as to the possession of the stolen property, but would depend upon the fact that he participated in breaking the car as a principal. He may have known the property was stolen and yet not be guilty of burglary. He could be guilty as a receiver of the property if when he received it, he knew it to be stolen, whether it came from the broken car or not. The charge was not such as ought to have been given and it was erroneous under the facts of this case.

There are some other interesting questions presented for revision, but we are of the opinion the trial court will understand from what has been said the other questions will follow the line of thought here indicated.

The judgment is reversed and the cause remanded.

Reversed and remanded.

PRENDERGAST, Judge, and HARPER, Judge.—We concur in the reversal of the case, but not in the first proposition herein discussed. Mr. Branch in his Criminal Law, sec. 875, correctly we think lays down the rule to be that if it is sought to be shown that the witness testified from corrupt motives, then he can be sustained by showing that before the motive existed, he had made the same statement. In this case, it being sought to be shown that the witness had testified under an agreement that he would not be prosecuted for the offense, this would be an effort to show a corrupt motive, and rendered admissible supporting testimony. Wharton Crim. Law, sec. 492, and cases cited in note 3; English v. State, 34 Texas Crim. Rep., 190; Reddick v. State, 35 Texas Crim. Rep., 463; Mitchell v. State, 36 Texas Crim. Rep., 278; Williams v. State, 24 Texas Crim. App., 637; Jones v. State, 38 Texas Crim. Rep., 87; Keith v. State, 44 S. W. Rep., 847; Ballow v. Statem, 42 Texas Crim. Rep., 261; Jones v. State, 38 Texas Crim. Rep., 87.

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MIKE PETERS v. STATE.

No. 2343. Decided March 12, 1913.

1.—Murder—Evidence—Bill of Exceptions—Clothes of Deceased.

Where, upon trial of murder, the clothes of deceased were introduced in evidence to illustrate a point in the case, there was no error.

2.—Same—Evidence—Bill of Exceptions.

Where, upon trial of murder, the court refused to admit testimony about deceased's having been once confined in the penitentiary and no bill of exceptions was reserved, the same could not be considered on appeal.

3.—Same—Charge of Court—Murder in the First Degree.

Where, upon trial of murder, the evidence raised the issue of murder in the first degree, the court correctly submitted the same to the jury.

4.—Same—Attorney—and Client—Affidavit—Newly Discovered Evidence.

Where, upon appeal from a conviction of murder, the defendant claimed newly discovered evidence, but the affidavit of appellant was made before his counsel, the same could not be considered; besides, the alleged testimony could not have produced a different result. Following Maples v. State, 60 Texas Crim. Rep., 169.

Appeal from the District Court of El Paso. Tried below before the Hon. Jas. R. Harper.

Appeal from a conviction of murder in the first degree; penalty, imprisonment in the penitentiary for life.

The State's evidence showed the parties lived near each other in the City of El Paso; that some misunderstanding, resulting from a rumor, that the deceased had made disparaging remarks about the defendant terminated in a wordy altercation between the parties near their premises; that defendant called deceased a liar, etc., deceased replying that if defendant would come outside of the fence, he would whip him with his hands; and that thereupon, defendant shot him three times, which resulted in deceased's death, who was unarmed at the time.

The defendant's testimony claimed that the deceased made an attack upon him and that he shot him in self-defense, thinking that deceased had a gun.

Chas. Owen and *Juan Larazola,* for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was prosecuted and convicted of murder in the first degree and his punishment assessed at imprisonment for life.

The first two grounds in the motion for new trial, complaining of the action of the court in admitting the garments worn by deceased at the time he was killed, in evidence, and rejecting certain testimony about deceased having once been confined in the Arkansas

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penitentiary, can not be considered, as no bills of exceptions were reserved. If bill had been reserved, the garments worn by deceased at the time of the homicide are always admissible if they serve to illustrate any point in the case, and under the evidence the clothing was properly admitted. And it is not shown in the motion at what time deceased was confined in the penitentiary, if he ever was, as presented, if a bill had been reserved, we could not say the court erred in the matter.

The evidence raised the issue of murder in the first degree, and the court did not err in submitting that degree of homicide to the jury.

The only other ground in the motion alleges newly discovered evidence. The affidavit was made before appellant's counsel. It has been the unbroken rule of decision in this court and the Supreme Court, that counsel in the case can not take such affidavits. Therefore, this is not presented in a way we can review the action of the court. (Maples v. The State, 60 Texas Crim. Rep., 169.) And we think this rule a sound one which will appeal to the judgment of all lawyers. Such affidavits ought to be made before wholly disinterested parties. But we have read the affidavit, and it is shown that the witness would testify that he was driving a wagon near the scene of the homicide, and heard quarreling. That he saw deceased come out of his house and walk towards the point where appellant was standing; that deceased had no weapons of any character, but when he got near the porch on which appellant was standing, appellant shot him, and continued to do so as he staggered and turned away. This testimony, in the light of the testimony of those who were present and witnessed the entire difficulty, and heard all the remarks, could not and would not have produced a different result had the testimony been introduced on the trial. It is proven beyond question that deceased was unarmed at the time he was killed and appellant admits that his mind was calm and sedate at the time he shot.

The judgment is affirmed.

Affirmed.

Searcy Hysaw v. State.

No. 2296. Decided March 12, 1913.

Rehearing denied April 23, 1913.

1.—Murder—Manslaughter—Sufficiency of the Evidence.

Where, upon trial of murder, defendant was convicted of manslaughter, which was sustained by the evidence, there was no error on that ground.

2.—Same—Charge of Court—Aggravated Assault—Weapon.

Where, upon trial of murder, there was no evidence that the knife used was a deadly weapon and the idea that defendant intended to kill deceased was excluded by the evidence, the court should have submitted a charge on aggravated assault.

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3.—Same—Evidence—Character of Deceased—Specific Acts.

When self-defense is an issue, and it is necessary to show the state of mind of defendant at the time of the commission of the homicide, specific acts of violence of the deceased which are then known to defendant and which show or tend to show that deceased was a violent and dangerous man may be ntroduced in evidence on the issue of self-defense; however, where such specific acts are not known to defendant prior to the homicide, general reputation alone is admissible.

4.—Same—Rule Stated—Cross-Examination.

Where specific acts of violence are introduced in evidence, the State should be permitted, on cross-examination, to go into the particulars of the specific act to rebut defendant's theory that deceased was a dangerous person.

5.—Same—Evidence—Specific Acts.

Where, upon trial of murder, proof that deceased habitually carried a pistol was admissible, but testimony that a witness saw deceased carry a pistol at one time was not admissible.

6.—Same—Evidence—Conduct of Deceased.

Where defendant did not attempt to show that the deceased had the general reputation of being a violent and dangerous man, it was improper for the court to prove or disprove this fact.

7.—Same—Conduct of District Attorney.

Where the conduct of the witness justified the conduct of the district attorney in cross-examining him, there was no error and the latter had the right to discuss this testimony.

8.—Same—Attorney—Contempt.

Where the cause is reversed and remanded on other grounds, it is not necessary to consider the complaint to the action of the court in imposing a fine on defendant's attorney.

9.—Same—Charge of Court—Reasonable Doubt.

It is always sufficient for the court to charge the reasonable doubt in substantial conformity to the language of the statute, and there was, therefore, no error in refusing a requested charge which did not conform thereto.

Appeal from the District of Caldwell. Tried below before the Hon. F. S. Roberts.

Appeal from a conviction of manslaughter; penalty, three years imprisonment in the penitentiary.

The opinion states the case.

E. B. Coopwood and *O. Ellis, Jr.,* for appellant.—On question of the court's failure to charge on aggravated assault: Hill v. State, 11 Texas Crim. App., 456; Thompson v. State, 24 id., 383; Shaw v. State, 31 S. W. Rep., 361; Martinez v. State, 33 S. W. Rep., 970; Craiger v. State, 88 S. W. Rep., 208; Wilson v. State, 49 Texas Crim. Rep., 50; 90 S. W. Rep., 312; Lucas v. State, 49 Texas Crim. Rep., 135; 90 S. W. Rep., 880; Thomson v. State, 49 Texas Crim. Rep., 384; 93 S. W. Rep., 111; Johnson v. State, 49 Texas Crim. Rep., 429; 93 S. W. Rep., 735; Vinson v. State, 58 Texas Crim. Rep., 47; 117 S. W. Rep., 846; Snowberger v. State, 58 Texas Crim. Rep., 530; 126

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S. W. Rep., 878; Ross v. State, 61 Texas Crim. Rep., 12; 133 S. W. Rep., 688.

On question of excluding evidence of deceased's carrying a pistol: Spencer v. State, 59 Texas Crim. Rep., 217; 128 S. W. Rep., 118.

On question of conduct of district attorney in cross-examination of witness: Kemper v. State, 63 Texas Crim. Rep., 1; 138 S. W. Rep., 1025.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—Upon a charge of murder appellant was convicted of manslaughter, from which he appeals.

It is unnecessary to give a statement of the evidence. In our opinion it raised the issue and was clearly sufficient to sustain a conviction for manslaughter.

For a long time before the evening of the killing appellant and deceased had known one another and they were friends. At least no trouble was ever shown to have existed theretofore between them. Appellant, a short time before the killing, had borrowed a dollar and a half from deceased, promising to pay it on the day of the killing, which was Christmas day, 1911. On the evening of that day they met in a saloon; deceased demanded the money from appellant and trouble arose between them. There was more or less harsh words and temper displayed by both of them on this occasion. They separated, or were separated by the intervention of friends. Deceased went out the back door and appellant the front door of the saloon. Shortly afterwards they met on the street when the trouble was renewed and the killing resulted.

From the State's standpoint and evidence appellant was the aggressor and the testimony was sufficient to have established murder and at least manslaughter. From appellant's standpoint and his testimony, self-defense was raised. The court charged thereon, as well as murder in the first and second degrees and manslaughter.

The court refused to charge on aggravated assault, although a special charge was requested on that subject by appellant, and proper complaint is made of the charge of the court, because of his failure and refusal to submit aggravated assault.

The knife with which the killing occurred was produced, identified and introduced in evidence, or at least, displayed and exhibited to the jury. The testimony all shows that it was only an ordinary pocket-knife. No testimony was introduced directly showing that it was a deadly weapon. The appellant stabbed deceased in the stomach only one time.. Appellant testified: "I did not try to cut him but the one time. I could have cut him all to pieces. I did not intend to kill him. I cut him to keep him from hurting me. I had no idea of killing him." The appellant further testified that when he first saw deceased after they went out of the saloon that deceased was

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coming towards him, cursing and that it scared him nearly to death. That he cut him with just a medium pocket knife and only once; that he didn't know when he got the knife out; that he was sarced to death. In our opinion, with the testimony as shown by this record, aggravated assault and battery was raised and it was reversible error for the court to refuse to submit that question to the jury. It it true the stab was in a vital part of the body and proved fatal. This would not necessarily exclude aggravated assault, and, especially in view of the fact that appellant claimed he was so badly scared and the knife used was not necessarily a deadly weapon and the manner of its use was not necessarily such as to exclude the idea that appellant did not intend to kill the deceased. So that, as stated above, in our opinion the evidence raised, and the court should have submitted, a proper charge on aggravated assault. For a collation of the authorities see sec. 434 Branch's Crim. Law.

Ordinarily proof that the deecased was a violent and dangerous man must be made by showing that that was his general reputation. Heffington v. State, 41 Texas Crim. Rep., 315; Connell v. State, 45 Texas Crim. Rep., 142; Poole v. State, 45 Texas Crim. Rep., 348; Darter v. State, 39 Texas Crim. Rep., 40.

However, when self-defense is an issue and it is necessary to show the state of mind of the appellant at the time of the commission of the offense, specific acts of violence of the deceased, which are then known to appellant or have been communicated to him which show, or tend to show that he was a violent and dangerous man, etc., may be shown for the purpose of showing that he acted in self-defense based on this information and knowledge to him of the character of the deceased, and to show his state of mind at the time. See sec. 473 Branch's Crim. Law, where these rules are stated and authorities establishing them are collated. However, such proof of specific acts of violence by the deceased can not be shown by the appellant, unless he knew, or was informed thereof, prior to the commission of the offense. Where he testifies on the trial that he knew or had this information, then he will be permitted to go further and prove by others who know the facts, the said specific acts of violence without going into the details thereof. But he can not introduce hearsay on that subject. In the event he shows that he had such knowledge or information, and testifies to such specific acts of violence, then introduces testimony by persons who know the facts and testifying to such specific acts, the State, in cross-examination of such witnesses, should be permitted to go into the particulars of the specific acts for the purpose of showing that the deceased was justifiable, or rebut defendant's theory that such acts show him to have been a violent and dangerous person, etc.

It is unnecessary to take up and discuss or decide each of appellant's bills of exceptions along this line. Upon another trial of the

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case, what we have said is sufficient to govern the lower court in the admission and exclusion of evidence on this point.

The court did not err in excluding the testimony of Austin Henderson wherein appellant sought to prove by him that he saw deceased at one time carrying a pistol. That the deceased was seen to carry a pistol at one time, which was not on the day or at the time of the alleged commission of this offense, would not be admissible; but proof that he habitually carried a pistol, if such were a fact, might be admissible. Lilly v. State, 20 Texas Crim. App., 1; Glenewinkel v. State, 61 S. W. Rep., 123; Branch v. State, 15 Texas Crim. App., 96. Especially would this be the case if appellant should show that he knew deceased was in the habit of carrying concealed weapons.

As appellant, who alone had the right to do so, did not attempt to show that the deceased had the general reputation of being a violent and dangerous man, it was improper for the court of his own motion to ask the witness Henderson questions seeking to prove or disapprove that fact. We think that where the appellant puts the reputation of the deceased in issue on this subject by evidence either of his general reputation to that effect, or by specific acts showing it, then it would be proper for the State to rebut this by showing that his reputation in this respect was not as attempted to be shown by such evidence, but his character was that of a peaceable, quiet and law-abiding man.

While prosecuting attorneys should observe the rules of propriety in cross-examining witnesses where they believe they are giving false testimony, yet, appellant's bills in this case, claiming that the court should not have permitted the district attorney to ask and say what he did with reference to the witness Lee Moore, as qualified by the court show no error; for the court states that the demeanor and answer of the witness justified the conduct of the district attorney. Certainly if the witness' credibility is to be passed upon by the jury, the prosecuting officer has the unquestioned right to discuss his testimony, and argue before the jury that it is false.

It is useless to discuss appellant's bills wherein he complains of the action of the court in imposing a fine upon his attorney for the manner in which he attempted to ask questions that had been prohibited by the court, for they doubtless will not occur upon another trial.

The court did not err in refusing to give this charge requested by appellant: "Upon the trial of a criminal case by a jury the law contemplates the concurrence of twelve minds in the conclusion of guilt before conviction can be had. Each individual juror must be satisfied beyond a reasonable doubt of the defendant's guilt before he can, under his oath, consent to a verdict of guilty. Each juror should feel the responsibility resting upon him as a member of the jury and should realize that his own mind must be convinced beyond a reasonable doubt of the defendant's guilt before he can consent to a

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verdict of guilty. Therefore, if any individual member of the jury, after having duly considered all the evidence in the case and after consultation with his fellow jurors, should entertain such reasonable doubt of the defendant's guilt as is set forth in their instructions in this case, it is his duty not to surrender his own convictions simply because the balance of the jury entertain different convictions." It is never proper to give such a charge in any case. It has uniformly been held by this court that it is sufficient for the court to charge the reasonable doubt in substantial conformity to the language of the statute.

Outside of giving a proper charge on aggravated assault, no other charge requested by appellant and refused by the court should have been given.

There are no other questions raised which require any discussion or decision on our part. For the error pointed out the judgment is reversed and the cause remanded.

Reversed and remanded.

[Rehearing denied April 23, 1913.—Reporter.]

WALTER WILSON V. STATE.

No. 1812. Decided October 16, 1911.

Rehearing denied March 12, 1913.

1.—Occupation—Intoxicating Liquors—Local Option—Sufficiency of the Evidence—Subterfuge.

Where, upon trial for unlawfully pursuing the occupation of selling intoxicating liquors in local option territory, the evidence clearly justified the jury in believing that the so-called lunches attended with the ordering of beer, etc., were a mere subterfuge, and that more than two sales of intoxicating liquors and the pursuing by defendant of such occupation was amply proved, the conviction was sustained.

2.—Same—Requested Charges—General Objections.

Where the error assigned on the refusal of submitting requested charges was of a general character without pointing out any error, the same could not be considered on appeal; besides, there was no error in refusing them. Following Berg v. State, 64 Texas Crim. Rep., 612, and other cases.

3.—Same—Constitutional Law—Indictment.

The Act of 1909, Penal Code, Article 589, making it unlawful to engage in the occupation of selling intoxicating liquors in local option territory is constitutional, and there was no error in overruling defendant's motion to quash the indictment on this ground. Following Fitch v. State, 58 Texas Crim. Rep., 366, and other cases.

4.—Same—Felony—Misdemeanor—Former Conviction.

Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the record showed on appeal that prohibition was in force prior to the time the felony Act went in force, and that defendant had been prosecuted and convicted in the County Court under said law for violating the local option law by making single sales, he could not plead these convictions as former jeopardy, as the offense for which he had

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been convicted was separate and distinct from the offense for which he was being tried. Following Robison v. State, 66 Texas Crim. Rep., 392.

5.—Same—Agreement of Immunity—District Judge—Approval.

An agreement between defendant and the prosecuting officers promising immunity from further prosecution is not valid without the approval of the district judge, where such agreement is offered in bar to the prosecutions then pending. Following Johnson v. State, 66 Texas Crim. Rep., 586, and other cases.

6.—Same—Evidence—Former Conviction.

Where defendant's plea of former conviction was wholly insufficient and was no bar to the offense for which he was being tried, there was no error in not permitting the defendant to offer testimony as to the conduct of the prosecuting officer in said former trial, or to show that the transaction was the same.

7.—Same—Other Sales—Occupation.

Upon trial of unlawfully engaging in the occupation of selling intoxicating liquors in local option territory, there was no error in admitting evidence of other sales than those specifically alleged in the indictment.

8.—Same—Evidence—Books of Express Company.

In a prosecution for unlawfully engaging in the business of selling intoxicating liquors in local option territory, the books of the express company having been properly proven up and the entries shown to have been correctly made and defendant's receipt therein show, were properly admissible in evidence. Following Stephens v. State, 63 Texas Crim. Rep., 382.

9.—Same—Leading Questions—Unwilling Witness.

It is always permissible to permit leading questions to be asked to an unwilling witness, etc. Following Carter v. State, 59 Texas Crim. Rep., 73.

10.—Same—Remarks by Judge.

Where the court before reading his charge to the jury explained to them the reason of the delay in the preparation of his charge, at which the jury had become impatient, there was no error.

11.—Same—Conduct of District Attorney.

Where the district attorney, in examining the jurors before they were empanneled, stated to them that the law now makes it a felony to engage in the occupation of selling intoxicating liquors in local option territory and asked them whether they believed it was a good law, etc., which they answered in the affirmative, there was no reversible error.

12.—Same—Charge of Court—Charge as a Whole—Occupation.

Where, upon trial of unlawfully pursuing the occupation of selling intoxicating liquors in local option territory, the court's charge, when taken as a whole, correctly charged the law under which defendant was being prosecuted, and the same could not have misled the jury to believe that two sales of intoxicating liquors would establish the offense, there was no reversible error.

13.—Same—Charge of Court—General Objections

An objection to the charge of the court in a general way without pointing out specific error cannot be considered on appeal. Following Ryan v. State, 64 Texas Crim. Rep., 628, and other cases.

14.—Same—Charge of Court—Accommodation.

Where, upon trial of unlawfully pursuing the occupation of selling intoxicating liquors in local option territory, the defendant claimed that he ordered the liquor as an accommodation to the parties to whom he was alleged to have sold it, and also claimed that he collected the money therefor before he

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ordered it, and the court's charge in this respect specifically submitted the defendant's theory, there was no error.

15.—Same—Charge of Court—Pursuing Occupation—Two Sales.

It is never error to charge the law as it is, when appropriate to charge it at all, and where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the court in his charge substantially submitted the statutes applicable to the facts in evidence and did not either directly or indirectly or by implication make the criterion of the offense to consist simply of two sales as synonomous with pursuing the business or following the occupation, but made defendant's guilt depend upon the fact that he pursued such occupation and, in addition, made at least two sales as charged in the indictment, there was no error.

16.—Same—Charge of Court—Practice on Appeal.

It is elementary that this court will not review complaints of the charge of the court when made for the first time in this court. In order to authorize a review of the court's charge, the objection must be raised either by bill of exceptions or by motion for new trial in the court below; and where the appellant, on motion for rehearing, claimed for the first time, error in the court's charge, because it required the jury to believe that he collected the money from the parties before the order for liquor was made, the same could not be considered.

17.—Same—Charge of Court—Sale—Accommodation.

Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the evidence showed that the defendant ordered liquor to be drunk with lunches with which he served certain parties, and the defendant claimed that he ordered this liquor for the accommodation of the parties and claimed that he collected the money from them before he ordered it, but the State denied this and contended that it was a sale and that he collected the money after ordering the liquor, and the court in his charge specifically followed the testimony as made by the defendant himself on this point in submitting the issue, there was no reversible error.

Appeal from the District Court of Hunt. Tried below before the Hon. R. L. Porter.

Appeal from a conviction of unlawfully pursuing the occupation of selling intoxicating liquors in local option territory; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Evans & Carpenter and *R. F. Spearman* and *Hal C. Horton* and *W. F. Ramsey,* for appellant.—On the question of former conviction: Prine v. State, 41 Texas, 300; Woodward v. State, 42 Texas Crim. Rep., 188; Shubert v. State, 21 Texas Crim. App., 551; Grisham v. State, 19 id., 504; Troy v. State, 10 id., 319; Munch v. State, 7 S. W. Rep., 341; Soliday v. State, 28 Pa., 5104; Corbett v. State, 63 Texas Crim. Rep., 478; 140 S. W. Rep., 342.

On the question of court's charge on definition of occupation: Fitch v. State, 58 Texas Crim. Rep., 366; 127 S. W. Rep., 1040; Thomas v. State, 66 Texas Crim. Rep., 382; Mizell v. State, 59 Texas Crim. Rep., 226; Clark v. State, 61 Texas Crim. Rep., 597; 136 S. W. Rep., 260; Floyd v. State, 66 Texas Crim. Rep., 407; 147 S. W. Rep., 264; Molthrop v. State, 66 Texas Crim. Rep., 543; 147 S. W. Rep., 1159.

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C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—Appellant was convicted under the Act of 1909 (P. C. Art. 589), for unlawfully engaging in and pursuing the occupation or business of selling intoxicating liquors in prohibition territory and his penalty fixed at the lowest term,—two years in the penitentiary.

Some nineteen separate and distinct sales of intoxicating liquors were alleged to have been made by appellant to respective persons named between the dates of March 10th to May 18, 1911.

Prohibition had been properly adopted and was in force in Hunt County, where this offense was alleged to have been committed, before 1911, and was in force when all these respective sales were alleged to have been made. It was also shown that between the dates of January 5th and May 22, 1911, appellant had shipped to and received, seventy quarts of intoxicating liquors (whisky). The shipments ranged from two to eight quarts at a time; and that between February 18th and May 22, 1911, he also had shipped to him by express and received, twenty-five kegs of beer. The shipments were one keg each day, received, except on March 20th and 25th, on which days he received two kegs per day. It appears from the evidence that the sale of beer by appellant was made under the guise of lunches. He would go to parties during the times he received this beer, tell them they were going to have a spread that day and that they were going to have beer, and would ask if they wanted to come in on it; that if they did it would cost them fifty cents for lunch. That there were usually from twelve to fifteen persons who would go in on these spreads, each contributing, or usually contributing, fifty cents. He would then order the beer from Dallas, buy some articles for a lunch and when the beer arrived would take it to some out of the way, or secret place, and the parties would then proceed to drink the beer and eat the lunches,—each person drinking beer, as it suited him, until it was all drank. On some occasions he would get these fifty cent payments before he would send for the beer, on others, after he had sent for it and when the beer was on hand. The evidence clearly justified the jury to believe that in most, if not all, of these instances, the lunches and the ordering of beer after the money had been made up and paid in, was a mere subterfuge to try to avoid the penalty of the law. It is true appellant claimed that he was doing all this without profit and merely acting as the agent for these respective parties in ordering, receiving and having them drink the beer and procuring and having them eat the lunches in connection therewith. He also claimed that the shipments of the seventy quarts of whisky, above shown, was not all for himself, but was ordered for others, they paying him the money in advance to get it for them, but all of this was for the jury. The evidence was amply sufficient to show many more than two sales of intoxicating liquors, if not all, of the eighteen

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or nineteen alleged in the indictment, and the evidence was amply sufficient to show that the appellant was engaged in the business and pursuing the occupation of selling intoxicating liquors in Hunt County, where prohibition was in force under said act of the Legislature.

A large number of bills of exception were taken to the proceedings and to the admission and exclusion of evidence. It will be unnecessary to take up these matters separately. We will hereinafter discuss such of them as it is necessary to notice.

Appellant also asked some eight or ten special charges which were refused. The only way error is assigned on any of these is, "the court erred in refusing to give defendant's special charge No. ——," filling the blank with the number of the charge. This is clearly insufficient to authorize this court to consider these charges, under the uniform decisions of this court. Berg v. State, 64 Texas Crim. Rep., 612; 142 S. W., 884; Ryan v. State, 64 Texas Crim. Rep., 628; 142 S. W. Rep., 878, and cases there cited. However, we have looked over the charges and in our opinion the court did not err in refusing to give them.

The Act of the Legislature under which this prosecution was had has been uniformly and many times held constitutional. See Fitch v. State, 58 Texas Crim. Rep., 366, and many cases since decided following this case. So that there was no error in the court overruling appellant's motion to quash the indictment in this case on the ground that the said Act was unconstitutional.

The record shows that prohibition was properly adopted, declared, etc., in Hunt County before the Legislature made a single sale in violation thereof, a felony, and, while the violation of such law made it a misdemeanor only. The record further shows that about June, 1911, by proper complaint and information the appellant was charged in the County Court, in some eight cases, with having made separate and distinct sales of intoxicating liquors. Some, at least, of these prosecutions were based on the same sales alleged to have been made by appellant to some of the parties in the indictment in this case. That after these prosecutions were begun, appellant made a trade with the county attorney by which it was agreed that appellant would suffer conviction in three of those cases, and the county attorney would dismiss the other five and that no other prosecution whatever should be had against appellant. All these prosecutions were for misdemeanors and all in the County Court of Hunt County, Texas. That thereupon, appellant did permit conviction to be had against him in three of said cases, the lowest penalty in each being assessed, to-wit: twenty days in jail and a fine of $25, and the other five of those misdemeanor cases were dismissed in the County Court, and the appellant at the time of the trial in this case had suffered part, if not all, of the penalties inflicted in said misdemeanor cases. The court, without a jury, heard all the evidence on this issue and held

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against appellant and struck out his plea of former conviction and jeopardy and his settlement of the matter with the county attorney. The county attorney and his assistant, and the county judge, and the district attorney, denied making any such trade and agreement with the appellant in the County Court cases. However, the appellant had some testimony which tended slightly to show that such an agreement may have been made and understood by the appellant. Appellant complains of the action of the court in striking out his said plea of former conviction, jeopardy, and agreement between him and said officers by which he was relieved of any further prosecution and in not submitting that question to the jury for its finding.

There was no error by the court in any of this matter. The offenses prosecuted in the County Court were separate and distinct from the offense with which the appellant was prosecuted and convicted in this case, and a conviction in any and in all of said County Court cases could not have been a bar to this conviction. This question has already been discussed and settled by this court in Robison v. State, 66 Texas Crim. Rep., 392; 147 S. W., 245, and cases there cited; Parshall v. State, 62 Texas Crim. Rep., 177; 138 S. W. Rep., 759. Besides, neither appellant's plea alleges, nor does the proof in any way suggest, that the District Court or the judge thereof, in any way or at any time agreed that the said prosecutions for misdemeanors in the County Court cases, should be any bar to the felony charge in this case. The county attorneys and county judge, even if they had attempted it, the district attorney agreeing or ratifying it, even if he did, without this approval of the District Judge, was not and could not be binding on the State. We do not intimate that any of the county officers or the district attorney made any such agreement with appellant as set up by him, nor that the suggestion thereof by the testimony on the hearing in this case would have authorized a finding that such was a fact. Johnson v. State, 66 Texas Crim. Rep., 586; 148 S. W., 300; C. C. P., Arts. 37 and 643; Fleming v. State, 28 Texas Crim. App., 234; Kelly v. State, 36 Texas Crim, Rep., 480; Diserin v. State, 59 Texas Crim. Rep., 149; 127 S. W., 1038.

The said plea of the appellant, being wholly insufficient and the offense in this case entirely different,—and a felony,—from those of the County Court,—which were misdemeanors,—the court did not err in not permitting appellant to show the course of conduct and what the county attorney did in other cases in no way connected with any of these cases against appellant; and neither did the court err in refusing to permit him to show that any of the various sales in this case were the same as those charged as single sales in the County Court.

Where a person is prosecuted under the statute under which appellant was prosecuted in this case, it is always permissible to prove other sales than those specifically alleged in the indictment for the purpose of showing that it was the business and occupation of the appel-

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lant to sell intoxicating liquors. Such has been the uniform holding of this court.

The books of the express company, having been properly proven up and identified and the entries shown to have been correctly made therein, and appellant's receipt for each item thereof having been shown, were clearly admissible in evidence. Stephens v. State, 63 Texas Crim. Rep., 382; 139 S. W. Rep., 1141-6.

It is always permissible for the court, in his discretion, to permit leading questions to be asked to an unwilling witness, and questions asked in such way for the purpose of refreshing the recollection of the witness. The court did not err in permitting this in this case, as complained by appellant. Carter v. State, 59 Texas Crim. Rep., 73.

By another bill it was shown that after all the evidence and argument of the case had been concluded, the court took a recess to a stated time to prepare his charge and examine appellant's special charges. When he returned to the court room it was about one hour later than the time stated for the adjournment for this purpose. When the Judge returned he found that some of the jury had become impatient at this delay. So when he went to read his charge to the jury he explained to them the reason of the delay, and in doing so he said to the jury, and explains the bill, as follows: "Gentlemen, it may seem that I have taken rather a long time to prepare this charge, but when it is taken into consideration that the court's charges are prepared with the view of being criticized by lawyers, and sometimes passed on by the higher courts, and that the court has to examine the special charges, perhaps it is not so long as it may appear."

"In making the above statement I had no intention whatever that the same should be applied by any one to the case at bar, and I am satisfied that the jury did not so construe it; in fact, I feel sure that no one could construe the remarks so as to justify them in concluding that they had the least bearing or influence whatever upon the jury in passing upon this case in their deliberations. In fact, if such remarks had had the least bearing upon the jury, or any one of them, there is no doubt in my mind that the defendant's counsel would have proven such fact upon their motion for a new trial." This bill presents no reversible error.

There was no reversible error shown by appellant's first bill, wherein the district attorney, in examining the jurors before empanelment, stated to them that the law now makes it a felony with a punishment of not less than two years for a person to engage in, or pursue the occupation of selling intoxicating liquors in local option counties, and asked them if they believed that was a good and wholesome law and ought to be enforced, as any other law on the statute books, to which they answered, yes, sir. The objection being: "We object to whether it's being a good and wholesome law as argumentative, tending to prejudge the facts in the case, and get the facts in advance."

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It is elementary that when objections are made to particular portions of a charge that the whole charge must be taken into consideration in determining whether such charge is erroneous or not. In the third paragraph of the charge, the court told the jury, in effect, that in order to constitute engaging in or pursuing the occupation or business of selling intoxicating liquors within the meaning of the law, which had in the preceding section been quoted substantially to them, that it shall be necessary for the State to prove that defendant had made at least two sales of intoxicating liquors within the period of limitation. In the 4th paragraph he told them that in order to constitute engaging in, or pursuing the said occupation or business, it is necessary for the State to prove, beyond a reasonable doubt, that the defendant unlawfully engaged in and followed said occupation and business in Hunt County at any time between January 1st and June 1, 1911, and that he unlawfully made, at least, as many as two sales of intoxicating liquors between said dates to the parties named in the indictment. Then in the next paragraph he submitted the case to them correctly for their finding, and told them they must believe, beyond a reasonable doubt, that between said dates, appellant did unlawfully engage in and pursue the said occupation and business as alleged in the indictment, and that between said dates alleged in the indictment he made as many as, at least, two different sales of intoxicating liquors to any of the parties named in the indictment, and if they so believed, to find him guilty, but unless they so find, beyond a reasonable doubt, to acquit him. Then in the next paragraph he told them that if they had a reasonable doubt as to whether appellant engaged in or pursued said occupation or business in Hunt County between said dates, or if they had a reasonable doubt as to whether he made as many as two sales to any of the parties named in the indictment, to acquit him. It is unnecessary in this connection to state the other issues submitted by the court to the jury. Taking this portion of the charge as a whole, it properly and substantially submitted correctly for a finding by the jury, the questions at issue. And appellant's exceptions to said third paragraph of the charge, that it was calculated to lead the jury to believe that two sales would establish the offense and that it was on the weight of the evidence; and to the fourth paragraph that it was on the weight of evidence and a repetition of the third paragraph and gave undue emphasis to the idea of the number of sales required to sustain the offense, are untenable and do not present any reversible error.

There are several separate grounds of the motion for a new trial to this effect: "The court erred in the fifth paragraph of his general charge." Then the same to the 6th, 9th, 10th and 11th paragraphs. These are too general and point out no specific error so as to authorize or require this court to pass thereon. Berg v. State, and Ryan v. State, supra.

In the 7th sub-division of the court's charge he told the jury that

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if appellant ordered beer and whisky for the parties named in the indictment, or for others, and that he ordered it as an accommodation for said parties and collected the money from them before the order was made, then he would not be guilty of making sales of intoxicating liquors and the jury should acquit him. In the 8th he told them that if they believed from the evidence that appellant ordered whisky and beer for the parties named in the indictment and as an accommodation for them and collected the money from the parties before the order was made, or if they have a reasonable doubt of it, to acquit the defendant. Appellant objects to these paragraphs of the charge, claiming that whether he ordered the said liquor as an accommodation or not, he would not be guilty. These charges in this respect submitted specifically the appellant's claim in the matter. He claimed that he ordered this as an accommodation to these parties and claimed that he collected the money therefor before he ordered it. This objection of appellant does not show any error in these paragraphs of the charge. They present the matter as favorably, if not more favorably, to the appellant than should have been done.

There being no reversible error, the judgment will be affirmed.

Affirmed.

ON REHEARING.

March 12, 1913.

PRENDERGAST, JUDGE.—There are but two questions necessary to pass upon which are urged in the motion for rehearing. The first is appellant's complaint of the third paragraph of the court's charge on the ground that it "was calculated to lead the jury to believe that two sales of intoxicating liquor within three years preceding the filing of the indictment will establish the offense with which the defendant is charged, and is on the weight of the evidence." He contends that a charge substantially if not literally as this was condemned and held erroneous by this court in Thomas v. State, 66 Texas Crim. Rep., 374; 147 S. W., 262.

In order to properly present this question we will state more fully the entire charge of the court on this subject, and in connection therewith, quote the statute.

The court, in the first paragraph of the charge, in stating the case to the jury, specifically tells them:

"The defendant, Walter Wilson, stands charged by indictment in this case with the *offense of unlawfully engaging in and pursuing the occupation and business of selling intoxicating liquors* in Hunt County, Texas, on or about the 12th day of May, 1911. To this charge he has pleaded not guilty." (Italics ours.)

This is as clear, unequivocal and specific as language can make it. No claim can possibly be made that by this statement the jury could in any possible way conclude, or for one moment consider, that two sales of intoxicating liquors constituted the offense. The language is,

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that he is charged with *"unlawfully engaging in and pursuing the occupation and business of selling intoxicating liquors."*

In order to show the charge in contrast with the statute we will, in parallel columns, quote the law and the charge.

The statute, P. C., Art. 589, is: "If any person shall engage in or pursue the occupation or business of selling intoxicating liquors, except as permitted by law, in any county, justice precinct, city, town or subdivision of a county, in which the sale of intoxicating liquor has been or shall hereafter be prohibited under the laws of this state, he or she shall be punished by confinement in the penitentiary not less than two nor more than five years."

The charge is: "2. Our statute provides: 'If any person shall engage in or pursue the occupation or business of selling intoxicating liquors, except as permitted by law, in any county, justice precinct, city, town or subdivision of a county in which the sale of intoxicating liquor has been or shall hereafter be prohibited under the laws of this State, he or she shall be punished by confinement in the penitentiary not less than two nor more than five years."

The statute is, Art. 591, P. C.: "In order to constitute the engaging in or pursuing the occupation or business of selling intoxicating liquors, within the meaning of this law, it shall be necessary for the State to prove in all prosecutions hereunder, that the defendant made at least two sales of intoxicating liquor within three years next preceding the filing of the indictment."

The charge is: "3. In order to constitute the engaging in or pursuing the occupation or business of selling intoxicating liquors within the meaning of the law it shall be necessary for the State to prove in all prosecutions for the violation of this law that the defendant made at least two sales of intoxicating liquor within three years next preceding the filing of the indictment."

It will be seen by the above that the 2nd paragraph of the charge is a literal copy of Art. 589 of the statute itself.

That the next paragraph of the charge is almost a literal copy of the statute, Art. 591. The only difference is that where the statute says, "within the meaning of *this* law," the court has "within the meaning of *the* law;" and that where the statute says, "it shall be necessary for the State to prove in all prosecutions *hereunder,*" the charge says "it shall be necessary for the State to prove in all prosecutions *for the violation of this law.*" It will be seen by this that no possible difference, so far as the use of the word "the" instead of "this" is shown, and no possible different meaning could thereby be had either directly or indirectly. Again, where the charge uses the words "for the violation of this law," instead of the word "hereunder," as the statute has it, following the words used, both in the

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law and in the charge, "it shall be necessary for the State to prove in all prosecutions," is in effect precisely and exactly the same. It would not have been proper for the court, in said 3rd paragraph, to have quoted the word "hereunder" as it is in the statute, but it was necessary and proper to use instead, the words he did use. There is no possibility of any error in the law as stated by the court in this paragraph and as the statute itself states it. The Legislature, by specific enactment, made both of these Articles a necessary part of the law of this offense. Acts of 1909, p. 284. It is never error to charge the law as it is, when appropriate to charge it at all.

Then immediately following the above paragraphs of the court's charge, quoting the statute constituting the offense, he aptly combines the two and tells the jury:

"4. In order to constitute engaging in or pursuing the occupation or business of selling intoxicating liquors it is necessary for the State to prove beyond a reasonable doubt that the defendant, Walter Wilson, unlawfully engaged in and followed the occupation and business of selling intoxicating liquors in Hunt County, Texas, at any time between the 1st day of January, 1911, and the 1st day of June, 1911, and that the defendant unlawfully made at least as many as two sales of intoxicating liquors between said dates in Hunt County, Texas, to the parties named in the indictment."

Then immediately following paragraph four, follows paragraphs five and six, as follows:

"5. If, therefore, you believe from the evidence beyond a reasonable doubt that between the 1st day of January, 1911, and the 1st day of June, 1911, the sale of intoxicating liquors was prohibited in Hunt County, Texas, under the laws of this State, and that the defendant, Walter Wilson, did at any time between said dates, in Hunt County, Texas, unlawfully engage in and pursue the occupation and business of selling intoxicating liquors, as alleged in the indictment, and if you believe the defendant unlawfully in said county and State, between said dates, and at or about the dates alleged in the indictment, made as many at least as two different sales of intoxicating liquors to any of the parties named in the indictment, then you will find the defendant guilty as charged; but unless you so find beyond a reasonable doubt you will acquit the defendant."

"6. If you have a reasonable doubt as to whether the defendant engaged in or pursued the occupation of selling intoxicating liquors in Hunt County, Texas, between the 1st day of January, 1911, and the 1st day of June, 1911; or if you have a reasonable doubt as to whether he made as many as two sales of intoxicating liquors to any of the parties named in the indictment on or about the dates alleged in the indictment, then you will acquit the defendant."

In our opinion it would have been impossible for the jury to have believed from these charges that they were authorized to convict appellant if he only made two sales of intoxicating liquors, and the

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charge in no way can be construed to be upon the weight of the evidence.

The charge of the court and original opinion in this case is in no way in conflict with said Thomas case, nor with the case of Floyd v. State, 65 Texas Crim. Rep., 407; 147 S. W., 264, nor with the case of Malthrop v. State, 66 Texas Crim. Rep., 543; 147 S. W., 1159-60-1, but is in strict accord therewith. A reading of the Thomas case will show that the charge held erroneous in that case was so held because the court specifically, as shown by the opinion in that case, authorized and permitted the conviction of the appellant therein, because he had made two sales and only two sales of intoxicating liquors. The opinion of the court in the Thomas case, after pointing out that there is a clear distinction made by law between the sale of intoxicating liquors in prohibition territory and the following of the business or pursuing the occupation of selling such liquors, says: "The court, however, in this case seems to make the criterion simply two sales as synonymous with pursuing the business or following the occupation of selling intoxicants." Again the court says: "The charge in this case makes the criterion of appellant's guilt depend upon the fact that two sales would constitute pursuing the business. This is not correct. The statute requires that he must pursue the business or follow the occupation of selling intoxicants, and, in addition to that, must make the necessary sales." In this case in no way did the court, either by directly so charging, or by implication, make the criterion simply two sales as synonymous with pursuing the business or following the occupation. But specifically, clearly and without doubt, made the criterion of appellant's guilt depend upon two things,—first, that they must believe beyond a reasonable doubt, that he pursued the business or followed the occupation of selling intoxicants and, in addition, made at least two sales charged and specified in the indictment. The poinion in this case is not in conflict with any other case decided by this court under this law, but on the contrary, is in consonance and in accord with all of them.

The only other contention urged in the motion for rehearing is his 35th ground of his motion for new trial. That ground is:

"The court erred in the 7th and 8th paragraphs of his charge, in that if the defendant ordered the liquor as an accommodation to the other parties, and not as a sale to them, or if he collected the money from the other parties for the liquor before the order was made, *whether he did so as an accommodation or not,* he would not be guilty." (Italics ours.)

The 7th and 8th paragraphs of the court's charge are:

"7. You are further charged that if the defendant ordered beer and whisky for the parties named in the indictment, or for others, and that the defendant ordered same as an accommodation for said parties, and that he collected the money from said parties before the order was made, then in that event, he would not be guilty of making

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sales of intoxicating liquors, and you should acquit him in this case."

"8. If you believe from the evidence that the defendant ordered whisky and beer for the parties named in the indictment and that he ordered same as an accommodation for said parties, and that he collected the money from said parties before the order was made, or if you have a reasonable doubt as to this issue, you will acquit the defendant."

Although appellant, in the original presentation of this case, filed an extensive brief, yet he in no way therein, or thereby presented this ground of his motion for new trial. It will be seen by this quoted ground of his complaint, that his contention hinges solely around the fact that said charges required that he ordered the liquor and collected the money for it, for the other parties *as an accommodation* to them, claiming that "whether he did so *as an accommodation or not*," he would be guilty. It is now, for the first time, in the motion for rehearing, claimed that these charges were erroneous in that they required the jury to believe "*that he collected the money from said parties before the order was made*," quite a different thing. It is elementary that this court will not review complaints of the charge when first made in this court. In order to authorize this court to review a question on the court's charge the complaint must have been in the court below, either by bill of exceptions or by motion for new trial.

As to appellant's said contention in the court below, the court's charge specifically followed the evidence as made by appellant himself and the whole of it, on this point. In the course of his testimony appellant repeatedly and at different times testified on this point. In speaking of ordering these liquors he said: "I didn't make any money on it, and the money was paid before I ordered; I did it for them as an accommodation." Then in another place, in speaking of ordering the beer and procuring the lunches, he went into a detail statement of how much the beer cost in Dallas, the express charges on it from Dallas to Greenville, the amount he would even pay for the postage stamp, and money order, and the 'phone charges, and "in those beer spreads I never did make a five cents out of any of this, but I chipped in like the rest and it was done in my name and that was the way it was done." Again, "at no time on these deals did I ever receive or make a five cents out of the transaction, but I put in my money and drank it with the crowd." Again, "I didn't get anything out of it,—Never received a cent for it." And again, "I was doing all this business for accommodation."

So that the court's charge in said paragraphs 7 and 8 on the ground of complaint made by the appellant in the court below was specifically and directly applicable to appellant's own testimony and his then claim and contention.

On the other point and contention, now for the first time made, if we could consider it, the charge was equally applicable and stated the correct principle under the case made and contention of the

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parties. The State's contention in the court below on this point was,—first, that appellant did not order the intoxicating liquors as an accommodation or otherwise for the parties, as he claimed he did, but that each order was, instead, a direct sale from him to these respective parties; second, his contention was that in every instance where he made the orders for these liquors, in order to show he did not sell to them, he claimed that he collected the money from the parties before he ordered the liquor, the State contending that he did not do so, but that he frequently and repeatedly collected the money from the parties *after* he had ordered the liquor, and frequently, after the liquors had been actually received and were then ready to be delivered or drunk, thereby making, instead of an order for other parties with their money, a direct sale to them by him.

So that in our opinion thees respective charges 7 and 8 correctly presented the questions to the jury, as raised by the parties on the trial. And appellant's contention in either contingency, whether made in the court below, or first made in this, presents no reversible error. The motion for rehearing is overruled.

Overruled.

GUY MCGEE V. STATE.

No. 2168. Decided March 12, 1913.

Rehearing denied April 2, 1913.

1.—Theft—Evidence—Identification.

Upon trial of theft, there was no error in admitting evidence to identify the alleged stolen belting by the way it had been mended.

2.—Same—Evidence—Value.

Where the alleged stolen belting was identified, there was no error in showing by experienced gin men the value thereof.

3.—Same—Evidence—Res Gestae.

Upon trial of theft of certain gin belting, there was no error in permitting the officers who held a search warrant to search defendant's house, to show that this house was pointed out to them; that they found and identified the belting; that defendant's hands were greasy from handling the same, and that he requested the officers to carry him to this house where he washed his hands and changed his clothing; it being shown that defendant occupied this house a few days before the theft and had his goods there.

4.—Same—Charge of Court—Alibi.

Where defendant claimed an alibi upon trial of theft, and the court gave a proper charge thereon, there was no error.

5.—Same—Charge of Court—Explanation—Recent Possession.

Where defendant, at no time, gave any explanation of his recent possession of the alleged stolen property and the court instructed the jury on circumstantial evidence, there was no error in the court's failure to charge on explanation of recent possession.

Appeal from the District Court of Mitchell. Tried below before the Hon. Roayll G. Smith.

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Appeal from a conviction of theft over the value of $50; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

F. G. Thurmond and *M. Carter,* for appellant.—On question of admitting evidence as to acts of officers in taking defendant to the house where property was found and what occurred there: Nolen v. State, 14 Texas Crim. App., 474; Wade v. State, 48 Texas Crim. Rep., 512; 90 S. W. Rep., 503; Bennett v. State, 48 S. W. Rep., 61; Jones v. State, 17 S. W. Rep., 1080.

C. E. Lane, Assistant Attorney-General, for the State.—On question of value: Cooksie v. State, 26 Texas Crim. App., 72.

On question of failure to charge on possession: Young v. State, 54 Texas Crim. Rep., 560.

HARPER, Judge.—Appellant was prosecuted under an indictment charging him with burglary and theft; he was convicted of theft of property over $50 in value, and his punishment assessed at two years confinement in the penitentiary.

About three o'clock on the 10th day of May, 1911, appellant was seen at Buford, in Mitchell County, where the Bedford gin was located, in a two horse wagon; between that hour and day light the next morning the belting was stolen from this gin. Appellant's father lived about eleven miles from this gin, and on the 12th belting of the kind was found in a house on these premises that had been occupied by appellant up to within three days of the theft, he not having removed all of his things out of the house.

There was no error in permitting witnesses to identify the belting found at this house as the belting stolen from the gin, by the way it had been mended. The men who did the repair work say they used "carpet tacks" and this belting when found had been repaired with carpet tacks.

Neither was there error in permitting these men to testify to the value of the belting. They show to be experienced gin men; could testify to the value of this belting when new; the length of time it had been used; its probable depreciation in value from use, and its value at the time it was stolen, and no witness suggested that it was of less value than $50 when taken.

The officers testify that a search warrant had been placed in their possession to search appellant's house; that this house was pointed out to them, and they searched it and found the belting therein identified as the stolen belting; when they arrested appellant his hands were "greasy" like theirs because from handling this belting. He was arrested in the field or pasture near by, when he requested the officers to carry him to this house, where he washed his hands, changed his clothing, getting the clothing out of the house in which the belting had been found. The fact that when he changed his clothing he was

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under arrest, would not render this testimony inadmissible. That this house was pointed out to the officers as appellant's house would not present error, when the record conclusively shows that he had occupied the house to within three days of the theft; that it had bedding, wardrobe and other things in the house at the time of his arrest, and his clothing was evidently also there, for he went to his house, changed his shirt, pants, etc., after his arrest, and left those he pulled off in this house. All these were circumstances in the case.

The testimony in this case was wholly circumstantial, and the defendant undertook to show his whereabouts from dark until eleven o'clock that night. The court, in an appropriate charge, submitted this issue, giving an approved charge on alibi, yet appellant could have been the person who took the belting and still been at the place where this witness placed him at the hour stated, for the belting could have been stolen at any time from three o'clock in the afternoon until day light next morning.

As defendant at the time he was arrested, or at any other time, gave no explanation of his possession of the belting, or circumstances connecting him with its theft, the court was not required to charge on possession of recently stolen property or explanation thereof, having instructed the jury fully as to the law of circumstantial evidence. The circumstances all tend strongly to show that appellant was the person who stole the property, and the court fully protected him when he instructed the jury:

"In order to warrant a conviction upon circumstantial evidence, each fact necessary to establish the guilt of the accused, must be proved by competent evidence beyond a reasonable doubt; all the facts (that is, the facts necessary to the conclusion), must be consistent with each other, and with the main facts sought to be proved; and the circumstances taken together must be of a conclusive nature, and producing in effect a reasonable and moral certainty that the accused and no other person committed the offense charged.

"It is not sufficient that the circumstances coincide with, account for, and therefore render probable the guilt of the defendant; they must exclude to a moral certainty every other reasonable hypothesis except the defendant's guilt and unless they do so beyond a reasonable doubt, you will find the defendant not guilty."

The judgment is affirmed. *Affirmed.*

[Rehearing denied April 2, 1913.—Reporter.]

James E. Bolton v. State.

No. 2246. Decided March 12, 1913.

1.—Official Misconduct—Misdemeanor—Jurisdiction—Constitutional Law.

Under Section 8, Article 5, Constitution of Texas, and Article 89, Code Criminal Procedure, the District Court has exclusive jurisdiction to try all misdemeanors involving official misconduct.

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2.—Same—Official Misconduct—Definition.

Both under the statutory and common law definition, official misconduct includes the failure to perform any and all acts required by law to be performed by such officer.

3.—Same—Case Stated—Jurisdiction—District Court—County Court.

Where defendant was indicted as a tax assessor of Dallas County for failure to make the report required by law showing the fees collected by him, etc., it was error to transfer the case to the County Court, as the District Court has the exclusive jurisdiction thereof.

4.—Same—Indictment—Statutes Construed.

An indictment charging the tax assessor for failure to make the report required by law showing the fees collected by him, etc., should allege that the county of the prosecution had more than fifteen thousand population.

Appeal from the County Court of Dallas County at Law. Tried below before the Hon. W. F. Whitehurst.

Appeal from a conviction of official misconduct; penalty, a fine of $100.

The opinion states the case.

Samuel & Adams, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.—On question of official misconduct: Craig v. State, 31 Texas Crim. Rep., 29.

HARPER, JUDGE.—In this case the appellant was alleged to be tax assessor of Dallas County on December 1, 1911, and that he failed to make the report required by law showing the fees collected by him for the fiscal year beginning December 1, 1910, and ending November 30, 1911. On the trial he was convicted, and his punishment assessed at a fine of $100.

When the indictment was returned into the Criminal District Court of Dallas County on the 7th day of May, 1912, the judge of the court transferred the case to the County Court of Dallas County at law. On the trial of the case in the County Court appellant did not plead to the jurisdiction of the County Court, but he has filed in this court a motion alleging that the indictment charged him with official misconduct and that the County Court has no jurisdiction of that offense, but the jurisdiction is conferred on the District Court by the Constitution and laws of this State. There can be no question but that Section 8 of Article 5, of the Constitution, confers on the District Court's jurisdiction to try all misdemeanors involving official misconduct, and that Article 89 of the Code of Criminal Procedure provides: "The District Court shall have exclusive jurisdiction in cases of misdemeanor involving official misconduct."

So the question here to be decided is, does the indictment allege that appellant was guilty of official misconduct? If so, the County Court had no jurisdiction over this offense, and its judgment is a nullity.

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What is meant by the words "official misconduct" in our Constitution and Code has been the subject of judicial inquiry in this State in a number of cases. In the case of Watson v. State, 9 Texas Crim. App., 215, this court held that this provision of the Constitution related to only such misdemeanors "that involve unlawful official behavior, willful or corrupt in its nature, whether an act of omission or commission," involving moral turpitude, but in the case of Hatch v. State, 10 Texas Crim. App., 515, that case was overruled insofar as it held that the County Court had jurisdiction to try an official for failure to perform any duty required of him by law, and held that such acts were "official misconduct" within the purview of the Constitution and Code, and the District Court alone had jurisdiction of such offenses. This latter case seems to be more in consonance with the definition of "official misconduct" contained in the statutes of this State. Article 6033 of the Civil Code provides that, under the head of "official misconduct" shall be included any willful failure, refusal or neglect of an officer to perform any duty enjoined on him by law. Inasmuch as the law makes it the duty of the assessor to make this report, and makes it a misdemeanor for him to fail to do so, we are of the opinion that such failure renders him guilty of "official misconduct," and that the County Court had no jurisdiction of this offense.

In Mecham on Public Offices, sec. 437, it is said: "The official doing of a wrongful act, or the officer's neglect to do an act which ought to have been done, will constitute official misconduct, although there was no corrupt or malicious motive." This rule is also approved in Thorp on Public Offices, sec. 855. Thus it is seen that whether we turn to the statutory definition of "official misconduct," or the common law definition, these words seem to include the failure to perform any and all acts required by law to be performed, and if such be the case, then under our Constitution and laws the County Court had no jurisdiction to try appellant for this offense, but the District Court has exclusive jurisdiction. Therefore, the case is reversed and remanded, with instructions to the County Court to retransfer this case to the Criminal District Court of Dallas County in which the indictment was returned by the grand jury.

There are other questions raised by appellant, but as the County Court had no jurisdiction to try this offense, we do not deem them before this court in a way we should review them. However, we will add, we think the indictment should have alleged that Dallas County was a county of the population named in the Act in which officers are required to make a report, that is, more than 15,000 population.

Reversed and remanded with instructions to retransfer the case to the Criminal District Court.

Reversed and remanded.

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HARRIS AND TOM JENKINS V. STATE.

No. 2350. Decided March 12, 1913.

Murder—Charge of Court—Malice—Joint Defendants.

Where, upon trial of murder of joint defendants, there was evidence that one of the defendants did not participate in the homicide, a charge of the court which only authorized an acquittal of either of the defendants in the event that neither acted with implied malice, and which did not segregate the individual intent of each defendant in submitting the law on principals, and without submitting the converse of such proposition, there was reversible error.

Appeal from the District Court of Walker. Tried below before the Hon. S. W. Dean.

Appeal from a conviction of murder in the second degree; penalty, twelve years imprisonment in the penitentiary for each defendant.

The opinion states the case.

Dean, Humphrey & Powell, for the appellant.—On question of the court's charge on murder in the second degree: Burns v. State, 58 Texas Crim. Rep., 463.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellants were jointly indicted and jointly convicted for the murder of Claude Mack, each being alloted a term of twelve years in the penitentiary for murder in the second degree.

The night of the homicide, and shortly prior thereto, Harris Jenkins and the deceased had some words, which grew out of their relation to a woman. Tom Jenkins was not present at the time and had no participancy in that matter. This occurred at a social function among the negroes. Shortly after this trouble the social affair ended. The deceased was traveling a road supposedly en route home. The woman about whom the trouble occurred had gone the same road which deceased was traveling. The two defendants traveled the same road. The theory of the State was they followed the deceased for the purpose of raising a difficulty with a view of killing him. The evidence for the defendants was to the effect that the defendant Harris Jenkins had gone the road to overtake the woman. It is also made to appear that Harris Jenkins had been intimate with the woman, and a child was the result of this illicit relation. Harris Jenkins' contention and his evidence was to the effect that he wanted to see the woman, and the evidence shows for the defendants that his brother, Tom Jenkins, went with him and was trying to persuade him to let her alone and go home, and that while going down the road hunting the woman they came upon the deceased and the tragedy followed. In regard to the immediate facts attending the killing, the

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State's theory was the defendants, when they discovered the deceased sitting near the road side, accosted him; he got up and asked if they wanted him; an affirmative reply was given, the State contending that Tom Jenkins made the reply, whereas defendants denied this, insisting that Tom Jenkins said nothing. The deceased approached the defendants while they were on their horses. The State's version of this is that Harris Jenkins immediately pulled his pistol and began firing, the deceased trying to get his pistol out in the meantime. The appellants' theory is that the deceased pulled his pistol when he got up and fired a time or two before Harris Jenkins fired. The deceased is shown to have fired four shots, the evidence being a little indefinite as to how many Harris Jenkins fired. No one testifies that Tom Jenkins was armed or fired a shot. So it will be seen, narrowed down to its final analysis, the State's contention was, the two defendants followed the deceased and brought on the difficulty, while the defendants' theory was that Harris Jenkins was hunting his mistress, accompanied by his brother, who was trying to persuade him not to go in that direction, and the meeting with the deceased was casual and accidental. The State's theory was that the killing occurred in pursuance of a conspiracy; the defendants' theory was, first, that Harris Jenkins was acting purely in self-defense, and second, that Tom Jenkins took no part in the transaction except as a bystander.

The court gave the following charge: "If you fail to find from the evidence beyond a reasonable doubt that the defendants, Harris Jenkins and Tom Jenkins, or either of them with implied malice, as the term implied malice is herein defined to you, did in the County of Walker and State of Texas, on or about the time alleged in the indictment, did unlawfully shoot and thereby kill the said Claude Mack, then you should acquit the said defendants or such defendant of murder in the second degree." Many objections were urged to this charge, among others, that the jury was only authorized to acquit the defendants in the event that they should find that neither of them with implied malice shot and killed the deceased. Another objection urged is that the charge was misleading and confusing in that the jury was instructed that they should acquit the defendants of murder in the second degree only in the event they failed to find from the evidence beyond a reasonable doubt that the defendants or either of them with implied malice, etc., unlawfully shot and killed deceased, and that the court does not in said charge or paragraph or anywhere else instruct the jury that if they fail to find from the evidence beyond a reasonable doubt that either of the defendants with his implied malice, etc., shot and killed deceased, they should find such defendant not guilty of murder in the second degree. To say the least of it, this charge is very awkwardly drawn, and subject to the criticism. The jury should have been told plainly and without circumlocution that if either one of the defendants killed the deceased upon implied malice, he should be convicted, and if the other did

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not or was not aiding and abetting as a principal the other in the killing, that he would not be guilty of murder in the second degree. It is far from clear that the quoted charge does so instruct the jury; especially is this criticism correct, we think, in view of the preceding section of the charge, which authorizes the jury if they believed the parties were acting together as principals and did this killing, they would both be guilty, that section of the charge nowhere segregating the two as to culpability of murder in the second degree. In this connection and with reference to the entire charge, it may be further said that the jury was not plainly told anywhere in the charge that they might acquit one and convict the other. While upon this phase of the charge it will be unnecessary to go into a general statement of the other exceptions to the charge presenting this same line of thought. Now, the court charged the jury with reference to principals, connecting the defendants under the law of principals and making them guilty if they acted as principals, but nowhere is the converse of this proposition presented, that is, if they were not principals they could not convict Tom Jenkins, although they might convict Harris Jenkins. Having submitted the law of principals under the facts above stated in this opinion, it was necessary to guard the legal rights of Tom Jenkins that the jury be instructed if these parties were not acting as principals, then they could not convict Tom Jenkins. In that even Harris Jenkins would only be responsible, self-defense aside. Harris Jenkins, under this testimony, might be guilty and Tom Jenkins not guilty, even from the State's standpoint. In any event, from all the evidence, this issue is sharply drawn, and the defendant Tom Jenkins' whole case was fought out upon the theory that he was not a principal and did not aid in any manner his brother in doing the killing, and not only so, but was with him for an innocent purpose. While the State's testimony might combat this idea, still the defendant is entitled to the view of the case as made by his testimony or by any other facts in the case that might be solved in his favor.

There are some other exceptions to the charge pointing out specifically here and there matters tending in the same direction and hanging around, as we understand it, the pivotal point. Without taking these matters up and going over them in detail, suffice it to say the case ought to have been submitted to the jury from the theory of the defendants, that unless they were acting as principals, that they might convict one and acquit the other. It is not intended by this to say that the court should abridge the defendants' right of self-defense in case the deceased made the first attack. If that was true, if Tom Jenkins was encouraging his brother to kill deceased after the attack of deceased, he would not be guilty. Two propositions we are intending here specifically to decide: first, that the court in his charge must properly segregate the two defendants to the jury, and, in the next place, that having given the charge of principals in the matter, then

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the converse of that proposition must be submitted to the jury. As before stated, without taking up the different issues of the case sériatim, the court will understand from the above statement the theory upon which this case ought to have been tried, and if the facts are the same it should be so tried before another jury.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

W. H. HOLMES v. STATE.

No. 2087. Decided March 12, 1913.

1.—Murder—Charge of Court—More than One Assailant.

Where, upon trial of murder, defendant's own testimony showed that he did not fear an assault from deceased's companion, he calling to the latter to get out of the way, and precluded the idea that defendant was in any danger from the latter or that he thought he was, there was no orrer in the court's refusal of defendant's requested charge to instruct the jury that if it reasonably appeared to defendant that deceased or his said companion was about to shoot defendant, he would be justified in slaying deceased.

2.—Same—Charge of Court—Requested Charge.

Where one of defendant's special instructions was embraced in the court's main charge and the other was not raised by the evidence, there was no error in the court's refusal of them.

3.—Same—Charge of Court—Provoking the Difficulty—Right of Going Armed.

As the court gave no charge on provoking the difficulty nor in anywise limited the right of defendant to act from real or apparent danger, it was not necessary for the court to instruct the jury in regard to defendant's right to go armed, etc.

4.—Same—Charge of Court—Presumption—Use of Deadly Weapon—Requested Charge.

Where, upon trial of murder, the evidence showed that the defendant heard deceased's companion say that whatever he had deceased could get, meaning his pistol, and that deceased took hold of it threatening to kill defendant, the court should have submitted defendant's requested charge that if the weapon used by deceased and the manner of its use was such as was reasonably calculated to produce either death or serious bodily injury, the law presumed that deceased intended these results, as this is the rule established by precedent; and a general charge on self-defense is not sufficient where the above charge is requested.

5.—Same—Charge of Court—Real and Apparent Danger—Self-Defense.

Where, upon trial of murder, the evidence did not raise an actual attack, but a reaching by deceased for a pistol, which, if true, would probably create in the mind of one a fear that deceased was then and there about to assault defendant, the court should have so written his charge on murder in the second degree and manslaughter that it would give defendant a right of self-defense from real or apparent danger.

6.—Same—Charge of Court—Necessary Force—General Definition.

Where the court's charge on self-defense submitted a general definition on self-defense, limiting the defendant to necessary and reasonable force to defend himself, but in applying the law to the facts, correctly applied the same, there was no reversible error; although, in a case of this kind, this character of charge should not be given.

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Appeal from the District Court of Augustine. Tried below before the Hon. W. B. Powell.

Appeal from a conviction of murder in the second degree; penalty, five years imprisonment in the penitentiary.

The opinion states the case.

Blount & Strong and *Davis & Davis*, for appellant.—On question of court's charge on self-defense in failing to give defendant's requested charge on presumption that deceased intended to kill defendant by the use of deadly weapon: Williams v. State, 65 Texas Crim. Rep., 347; 144 S. W. Rep., 620; Teel v. State, 69 S. W. Rep., 531; Polk v. State, 60 Texas Crim Rep., 499; Hudson v. State, 59 id., 650; McMichael v. State, 49 id., 422; Hall v. State, 43 id., 479; Ivory v. State, 48 id., 279; Cooper v. State, 48 id., 36; Yardley v. State, 50 Texas Crim. Rep., 644; Smith v. State, 57 id., 455; Jones v. State, 17 Texas Crim. App., 602; Cochran v. State, 28 id., 422; Ward v. State, 30 id., 687; King v. State, id., 277; Kendall v. State, 8 id., 569.

On question of court's charge on force in self-defense: Antu v. State, 66 Texas Crim. Rep., 329; 147 S. W. Rep., 234; Castro v. State, 66 Texas Crim. Rep., 282; 146 S. W. Rep., 553; Carson v. State, 57 Texas Crim. Rep., 394; Huddleston v. State, 54 id., 93; Crenshaw v. State, 48 id., 77; Scott v. State, 46 id., 305.

On question of court's charge in failing to submit more than one assailant: Recen v. State, 58 Texas Crim. Rep., 457; Arnwine v. State, 50 id., 254; Roberts v. State, 48 id., 378; Carter v. State, 37 id., 403; Cartwright v. State, 16 Texas Crim. App., 473; Jones v. State, 20 id., 665; Bean v. State, 25 id., 346.

On question of court's failure to charge on apparent danger: Bell v. State, 20 Texas Crim. App., 445; Spearman v. State, 23 id., 224; Tillery v. State, 24 id., 251.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was indicted, charged with murder, and convicted of murder in the second degree and his punishment assessed at five years in the penitentiary.

In this case the appellant in his motion for new trial bases his main complaints to the charge of the court and the failure to give several special instructions requested. Defendant does not deny the killing, but claims he was justifiable in so doing, and the court erred in submitting this issue, and erred in failing to instruct the jury as to the presumption of law arising from the attempted use of a pistol. The defendant testified that deceased, Mr. Boatman, had requested him to sell a horse for him. The day of the killing, he states, he got a chance to sell the horse, and went to see deceased about it. That when he found deceased he was with Redman Posey, and that without just cause or provocation, both cursed and abused him, Posey pulling a

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pistol, and telling Boatman that what he had, he (Boatman) had. He says after they had cursed and abused him for some time, they all went on towards the place where Boatman was stopping. That he then went home, and as he had promised some friends to go duck hunting with them, he got his gun and started to go to the pond where he had promised to meet them, the road going by where he knew Boatman was staying. It appears that all of them were drinking considerably on that day. Appellant states that he passed the house where deceased was staying and then details the matter as follows:

"As I left Mr. Posey's house going down the lane I met Redman Posey about fifty or sixty steps, possibly sixty-five steps from Mr. Perry's. I was there when it was stepped since that time. Mr. Posey was afoot and coming towards Mr. Perry's and I was going the other direction towards Prairie. When I met Mr. Posey he said, 'Heloo, where are you going in such a hurry?' and I said I was going towards Prairie, duck hunting, and he said, 'I expect you are,' and I said, 'Yes, come and go with me,' or something to that effect; I wanted to pass by, I did not know whether he was sober and he spoke something about the Choate boys up in Shelby County. I used to run with them a right smart and we were talking about them some, joking the boys, and I said, 'I am going to the duck pond,' and he said, 'Have you got any whiskey?' and I said, 'Yes,' and I pulled out a quart bottle out of my shot pouch. I had a shot pouch about that long I toated squirrel or birds in and shells, too, and it was hanging on the horn of my saddle and I pulled the bottle out and handed Mr. Posey it, and he taken a drink and handed it back to me and I set it on the horn of my saddle on my leg and was sitting there talking, and the first thing I knew after that Mr. Boatman came up, he came right up by the side of my mule and he said, 'What did North Carolina say to South Carolina?' and that was an old saying, he said what did they say, and I said they said it was a long time between drinks, and the bottle was sitting up there and I handed it over to Mr. Boatman and he taken a big drink. Mr. Posey had a pistol on him, I could see the bulk of it under his coat, swinging around. He carried his pistol in a scabbard on a belt. The scabbard stuck below the end of his coat, I could see it when he was walking, see the end of the scabbard. He had his pistol when I met him there. When I said a long time between drinks, Mr. Posey spoke one or two short words and Mr. Boatman commenced, and he said, 'Where in the hell are you goin?' and I said I was going a duck hunting, and he said, 'You are a God dam liar you are not going to no duck pond,' and I said, 'Yes, I am,' and he said, 'You are a God dam lying son-of-a-bitch, you are not going,' and he kept cursing, and I said, 'You all rode over me in the bottom and I took it and I said it is about time you were quitting it. I said I have not stopped to have any trouble and I said Redman stopped me,' and he said, 'You are a God dam liar,' Redman says

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that, and I said, 'That is all right,' and Boatman was cursing me for a son-of-a-bitch and everything and my mule in standing there was working around; I was sitting on him, he was restless and he had turned around and had his head turned to come back towards home, and about that time I made some rough talk back to them about getting on me so hot, and told him he was a God dam liar or something that way, and when I said that Redman Posey jerked his pistol up and said, 'Boatman, I have got as good a pistol as ever made and what I have got you have got it,' and *I said, 'Mr. Boatman has got to apologize to me tomorrow or you or me one die,' and I turned to ride off and when I got something about something like ten steps, maybe I don't suppose over eight or* ten steps, I heard him say, 'I will kill the God dam son-of-a-bitch,' and I looked back over my shoulder and looked back that way and I saw him hold of the pistol and Posey, too, and I whirled my mule, *I saw there wasn't any chance to get away, I whirled the mule and when I whirled him I threw the gun to my shoulder, I said, 'Look out Redman!'* and I cut down on him. It looked like Boatman and Posey both had a hold of the pistol at the time I shot. I shot Mr. Boatman because I saw that he was going to kill me, it was to save my life, that is just how come it. I stated that I had gotten about ten steps away from him riding in the direction of Mr. Perry's house when I heard those remarks. When I heard him say he would kill the God dam son-of-a-bitch I looked back. I just jerked the mule sort of that way and threw myself in the saddle, I was going with my face to the west, the road run west, I was going that way, and the mule sort of turning and I threw the gun up, and just as *I turned to shoot I said, 'Look out Redman!' and shot. I did not shoot more than one time.*"

This puts the matter in as favorable light for appellant as any part of the record, and we do not think the court erred in refusing the special charge wherein appellant requested the court to instruct the jury that if it reasonably appeared to him that deceased, or Redman Posey was about to shoot him he would be justified in slaying deceased. Appellant's own testimony shows that he did not fear an assault from Posey, he calling to Posey to get out of the way. Appellant's testimony precludes the idea that he was in any danger from Posey, or that he thought so.

Special charge No. 1 was fully covered by the court in his main charge and the testimony does not raise the issue on which charge No. 2 is based. As the court gave no charge on provoking the difficulty, nor in anywise limited the right of defendant to act from real or apparent danger, it was not necessary for the court to instruct the jury in regard to appellant's right to carry a gun or go by Mr. Posey's.

Special charge No. 5 was fully covered by the court in his main charge, but the presumption from the use of a weapon requested in

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charge No. 6, was not given and appellant earnestly insists that the court erred in refusing to give this charge. It reads:

"You are charged as a part of the law of this case, that if you find and believe from the evidence, that at the time defendant fired the shot, that the deceased was making or attempting to make an attack upon him, under circumstances which reasonably indicated his intention to murder defendant or to do him some serious bodily injury, and the weapon used by deceased, and the manner of its use, were such as were reasonably calculated to produce either of those results, then the law would presume that deceased intended to kill defendant or to do him some serious bodily injury."

Appellant testifies that some time during that day Posey had pulled his pistol and said to deceased, "What I have got you have got;" that when deceased cursed him, he rode off, and looking back he saw Posey had his pistol out and deceased had hold of it. Taking into consideration that appellant says that he heard Posey say that whatever he had deceased could get, was this such use of the pistol as to call for a charge instructing the jury that if deceased was attempting to use the pistol, then the law presumes that he did intend to do so? Were this an original proposition, the writer would individually hold that when the court instructed the jury that if "deceased was making an attack or *was doing some act which from the manner and character thereof,* viewed from the standpoint of defendant, there was created in his mind a reasonable expectation or fear of death or serious bodily injury," he was guilty of no offense, the failure to instruct the jury as to the presumption arising from the use of a weapon would not present reversible error. However, it seems to be the rule established by this court that when the deceased had in his hand a deadly weapon, the failure to instruct the jury in regard to this presumption, when a special charge is requested, presents reversible error, and being of the opinion that this court should announce the law and adhere to one line of decisions, the writer will not again refer to this matter, but will follow those decisions until the court is willing to change this rule of law. However, if no special charge is requested we will look to the record to see if injury could have resulted from a failure to so charge. The idea being, insofar as we are concerned, that it would only be necessary to charge this presumption specifically when there was an issue raised by the evidence as to the intent of the party, and if there was no evidence raising this issue, then if the court instructed the jury that if one assaulted another with a pistol he would be justified, or if it reasonably appeared to one from the acts and conduct of the other that his life was in danger or he was in danger of serious bodily injury, this would present the case in a way in which no defendant could or would be injured.

The criticism of the court's charge on murder in the second degree that it limited appellant's right to act in self-defense if deceased

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made *an actual attack,* is not, when the charge is read as a whole, such error as it alone would be cause for reversal, but as the case will be reversed because of the court's failure to instruct the jury in regard to the presumption arising from the use of a weapon, we would suggest that this paragraph of the charge be so written that it would give defendant the right to act from real or apparent danger. The charge on manslaughter is also subject to the same criticism. In this case the evidence does not raise an actual attack, but a reaching for a pistol, which, if true, would probably create in the mind of one a fear that deceased was then and there about to assault him.

The only other ground in the motion we deem it necessary to mention, complains of the following paragraph of the court's charge: "Every person is permitted by law to defend himself against any unlawful attack, reasonably threatening injury to his person, and is justified in using all necessary and reasonable force to defend himself, but no more than the circumstances reasonably indicate to be necessary. Homicide is justified by law when committed in defense of one's person against any unlawful and violent attack, made in such a manner as to produce a reasonable expectation or fear of death or some serious bodily injury." This is but a definition, that occurs in the charge where the court is defining murder in the first and second degree. When the court instructed the jury as to the law of self-defense and applied it to the facts in this case, he does not limit appellant's right to act from appearances of danger in any manner whatsoever, but instructs the jury that if deceased was "doing an act from the manner and character of which it reasonably appeared to him his life was in danger or he was in danger of suffering serious bodily injury, then he was justified in slaying deceased, and the jury should acquit him." We discussed a similar charge to that given in this case recently in the case of Lee v. State, 67 Texas Crim. Rep., 137, 148 S. W. Rep., 706, and in other cases, and therein held, and again hold, that even though this paragraph be given in a charge wherein definitions are being given, if the court in applying the law in that part of the charge wherein the issue of self-defense does so correctly, this presents no error. However, in a case of this kind this character of charge should not be given.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

J. H. LEWIS V. STATE.

No. 2295. Decided March 12, 1913.

Rehearing denied April 16, 1913.

1.—Illegally Practicing Medicine—Definition of Offense—Constitutional Law.

The medical practice Act is constitutional, and does not seek to regulate how anyone may treat disease or disorders, but simply provides that before

he does so, he shall demonstrate that he is well grounded in certain studies named in the Act; and no one has an inalienable right to practice medicine or treat disease for pay. Following Newman v. State, 58 Texas Crim. Rep., 223, and other cases.

2.—Same—Case Stated—Sufficiency of the Evidence.

Upon trial of practicing medicine without authority, etc., where the evidence showed that defendant treated and offered to treat paralysis, rheumatism, asthma, etc., making specific charges for the treatment thereof, without having registered his authority to do so, the conviction was sustained.

Appeal from the County Court of Comanche. Tried below before the Hon. J. M. Rieger.

Appeal from a conviction of unlawfully practicing medicine; penalty, a fine of $50 and one hour confinement in the county jail.

The opinion states the case.

Sol L. Long and *Smith & Long,* for appellant.—On question of insufficiency of the evidence; Nelson v. State, 57 S. W. Rep., 501; State v. Mylod, 41 L. R. A., 428; Hayden v. State, 33 Sou., 653; Underwood v. Scott, Pac. Rep., 942.

On question that Act does not apply to masseurs: Dunlop v. U. S., 165 U. S., 486.

C. E. Lane, Assistant Attorney-General, for the State.—Cited cases in opinion.

HARPER, JUDGE.—Appellant was convicted of the offense of practicing medicine without having registered his authority so to do, if he had any such authority, from the State Board of Medical Examiners.

Appellant earnestly insists that as he did not prescribe, nor give medicine for the treatment of disease he does not come within the provisions of the medical practice Act, or, if the Act is so drawn as to include one who treats disease, otherwise than by administering medicines, then the act is unconstitutional. Appellant's counsel have filed an able and extensive brief, but cite us to no authorities as sustaining their contention, and we have found none. In the first place, we want to call attention to the fact that the medical practice Act does not seek to regulate how anyone shall treat diseases or disorders, —it simply provides that before anyone shall treat or offer to treat diseases or disorders for the human family, he shall demonstrate that he is well grounded in certain studies named in the Act. This is to compel a person to show he has a knowledge of the human frame, the organs of the body, and an ability to diagnose diseases, etc. If he shall pass this examination, then the treatment of disease is left to his judgment and in no way does the Act seek to control how any man shall treat disease. The misconception of the terms of the medical practice Act has been the basis of much argument. No one has

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an inalienable right to follow the occupation of practicing medicine or treating disease for pay, any more than one has the inalienable right to follow the occupation of practicing law for pay, or to practice dentistry, or any other occupation that requires and demands a certain amount of what might be termed technical knowledge of the subject with which he represents he is competent to practice. Every question raised by appellant in his brief has been so thoroughly discussed by this court in cases heretofore decided, we deem it but useless to reiterate the law as therein announced, as the argument of appellant's counsel has not caused us to change our views as therein expressed. For a complete discussion of every question raised by appellant see the following cases: Newman v. The State, 58 Texas Crim. Rep., 223; Dankworth v. The State, 61 Texas Crim. Rep., 157; Germany v. The State, 62 Texas Crim. Rep., 276; Ex Parte Collins, 57 Texas Crim. Rep., 2; Collins v. The State of Texas, 223 U. S., 288, 56 Law Ed., 439; Singh v. State, 66 Texas Crim. Rep., 156, 146 S. W. R., 391; Collins v. The State, 152 S. W. R., 1047, and cases cited in these decisions.

In this case it was shown that appellant had treated and offered to treat paralysis, rheumatism, asthma, tonsilitis, kidney trouble, cancer, female trouble, stomach trouble, nervousness, abscess, neuralgia, and various other diseases, even to removing cataracts, etc., making specific charges for the treatment.

The judgment is affirmed.

Affirmed.

[Rehearing denied April 16, 1913.—Reporter.]

LISHA GRADINGTON V. STATE.

No. 2145. Decided March 12, 1913.

1.—Burglary—Shooting into House of Another with Intent to Injure—Sufficiency of the Evidence.

Where, upon trial of burglary by the unlawful discharge of firearms into the house of another with intent to injure the inmates, the evidence sustained the conviction, there was no error.

2.—Same—Circumstantial Evidence—Charge of Court.

It is only when the evidence is wholly circumstantial that a charge on that character of evidence is required, and where defendant was positively identified, there was no error in the court's failure to charge on circumstantial evidence.

3.—Same—Evidence—Leading Questions.

Where the bill of exceptions did not show that a leading question, even if it was one, was not permissible, there was no error. Following Carter v. State, 59 Texas Crim. Rep., 73.

4.—Same—Evidence—Motive—Limiting Testimony.

Upon trial of burglary by shooting into a house with intent to injure, there was no error in admitting testimony of previous assaults and assaults

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and batteries by defendant upon prosecutrix, and such testimony need not be limited in the court's charge, although the court did so limit the same. Following Millican v. State, 63 Texas Crim. Rep., 440, and other cases.

5.—Same—Evidence—Supporting Testimony.

Where, upon trial of burglary, the defendant sought to impeach the testimony of prosecutrix, there was no error in permitting the State to introduce supporting testimony to the effect that she had made these statements before, and there was no error in not charging on such testimony.

6.—Same—Reforming Judgment—Practice on Appeal.

Where, upon trial of burglary by the discharge of firearms into the house of another with intent to injure the inmates, of which offense he was convicted, but inadvertently sentenced for an assault with intent to murder, the judgment will be so reformed as to comply with the verdict of the jury and the judgment will be affirmed.

Appeal from the District Court of Bastrop. Tried below before the Hon. Ed R. Sinks.

Appeal from a conviction of burglary by shooting into the house of another, etc.; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.—On question as to when leading questions may be asked: Rodriguez v. State, 23 Texas Crim. App., 503; Moore v. State, 37 Texas Crim. Rep., 552; Mann v. State, 44 Texas, 642.

On question of supporting evidence: Hamilton v. State, 36 Texas Crim. Rep., 372; Campbell v. State, 35 id., 160; Duke v. State, 35 id., 283; English v. State, 34 id., 190.

PRENDERGAST, JUDGE.—Appellant was convicted of burglary and his penalty fixed at two years in the penitentiary.

The evidence is amply sufficient to show that for some two or three years prior to July 29, 1911, the date on which the offense is charged to have been committed, appellant lived with and probably "kept" Patsy Foster, the injured party; that some time before the commission of the offense she quit him and went back to her mother's; that, it seems, another negro man was paying her attention and had gone with her and brought her back from some gathering the night the offense is charged; that soon after her return from this party with the other negro man the appellant shot into the house of her mother, some of the shot striking her, and showing clearly from the circumstances, his intention to injure her. The evidence is amply sufficient to sustain the verdict.

The testimony of Patsy Foster, the injured party, showed and she testified positively, that it was the appellant who shot into the house and shot her and that she saw him at the time and immediately there-

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after when he ran away from the house. No charge on circumstantial evidence was, therefore, necessary. It is only when the evidence to sustain a conviction is wholly circumstantial that such a charge is required.

Appellant's bill that a question by the prosecuting officer to Patsy Foster wherein she was asked what appellant's idea was in wanting her to live with him, and "did he want her to sleep with him?" was leading, clearly does not show that a leading question, even if this was, was not permissible. (Carter v. State, 59 Texas Crim. Rep., 73.) Neither was such proof in this case irrelevant or incompetent.

Antecedent menaces, quarrels, assaults and batteries, and grudges may always be shown to prove motive. (Sullivan v. State, 31 Texas Crim. Rep., 488.) In this case the court, therefore, did not commit any error in permitting the State to prove the previous assaults and assaults and batteries committed by appellant upon said Patsy Foster in order to show motive, and no charge was necessary limiting the effect of such evidence, because motive is a part of the proof to establish the main offense. But if it was necessary to limit such proof, the court did so in this case properly by charging in a separate paragraph, this: "The defendant is on trial on the charge contained in the indictment only. You are charged that if any evidence has been introduced as to any other offense, you cannot eonvict him in any event of such offense, if any." Millican v. State, 63 Texas Crim. Rep., 440, and authorities there cited.

Patsy Foster, as stated above, testified positively that appellant shot into the house and shot her at the time the offense is charged; that she saw him, identified him and saw him run away immediately after he shot. In order to impeach her, appellant asked her if she did not state to various persons, naming them, the next day and later, in effect, that she did not know who shot her but she thought it was appellant. She denied making such statements. Appellant then put witnesses on who testified she did make such statements. The State was then properly permitted to corroborate her by proving by the constable that early the next morning after the shooting the night before, he investigated the matter and that Patsy Foster then and there told him that it was appellant who shot into the house and shot her that night. Sec. 874, Branch's Crim. Law, where a large number of the cases are collated. No charge was asked as to the effect of this supporting testimony. Any charge on that subject would have been on the weight of the evidence and specially called attention to the testimony of the complaining witness and this testimony in support of it. No reversible error was committed under the circumstances in not charging thereon.

The appellant has called our attention to the fact, in what he calls his supplemental assignments of error filed long after the adjournment of the court, that the sentence of the appellant, instead of being for burglary, with which he was charged and convicted, and the judg-

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ment of conviction and verdict so showed, that he was sentenced for assault with intent to murder. This, of course, was an error, but as the indictment, charge, verdict and judgment thereon clearly show that he was convicted for burglary instead of assault with intent to kill, under the statute the final sentence will be set aside and this court will, and does now here direct and require that the sentence shall be so made and changed as to show that he was and is sentenced for burglary, instead of an assault with intent to murder. With this correction, there being no reversible error presented, the judgment is affirmed. *Affirmed.*

Audie Christie v. State.

No. 2340. Decided March 19, 1913.

1.—Murder—Sufficiency of the Evidence.

Where, upon trial of murder, the evidence sustained a conviction of murder in the first degree, there was no error.

2.—Same—Alibi—Charge of Court.

Where, upon trial of murder, the defense was an alibi, and the court properly submitted this issue, there was no error; the evidence sustaining the conviction.

3.—Same—Evidence—Bill of Exceptions.

Where, upon appeal from a conviction of murder, the qualification of the bills of exception by the trial judge showed that the court did not err in sustaining the State's objection to defendant's questions to the State's witness as to whether he was the witness in certain prosecutions for selling liquor, there was no error; besides, the bill of exceptions was defective.

4.—Same—Evidence—Shorthand Facts.

Upon trial of murder, there was no error in admitting testimony as to the opinion of the witness that a person standing at a certain place could have shot the deceased, the same being merely a shorthand rendition of the facts; besides, the same facts were proved by other witnesses without objection. Following Wagner v. State, 53 Texas Crim. Rep., 306, and other cases.

5.—Same—Evidence—Repetition.

Where, upon trial of murder, the record showed that the alleged examination of the witness was a mere repetition of what the witness had already testified to, there was no error in sustaining objections by the State thereto.

Appeal from the District Court of Houston. Tried below before the Hon. B. H. Gardner.

Appeal from a conviction of murder in the first degree; penalty, imprisonment for life in the penitentiary.

The opinion states the case.

Adams & Young, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, Judge.—Appellant and his brother, Jewell Christie, were jointly indicted and jointly tried for the murder of

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Dock Durham, alleged to have been committed on February 10, 1912. Jewell Christie was acquitted; Audie, appellant, was convicted of murder in the first degree, and his penalty fixed at confinement for life in the penitentiary.

Appellant's main contention is, that the evidence is insufficient to sustain the verdict. He claims that the evidence was as strong against Jewell as himself, and as Jewell was acquitted, the case should be reversed as to him.

We have carefully read and studied the whole of the evidence. In our opinion the evidence is amply sufficient to sustain the verdict against appellant, and is nothing like as strong against Jewell as against him.

It is unnecessary to detail the evidence. We will give a brief synopsis of the material part of it. Deceased was the uncle of appellant; they lived near one another in the same community. About two months before the killing the son of deceased had a fight with Jewell Christie, if not with both him and appellant. In this fight deceased's son cut Jewell, but Jewell recovered from his injuries. The deceased on one occasion, if not more than one, attempted to make friends with appellant and try to get him especially to drop the difficulty. Appellant expressly refused to do this, claiming that while deceased's son was in the fight and cut his brother, yet the deceased himself was back of it and to blame for it. Deceased was an elderly man; appellant a young man.

Deceased was assassinated by being shot at night through a window by some one who, it was clearly shown, stood in some fifteen or twenty feet from the window at the time the shot evidently was fired. The killing occurred at the home of a neighbor by the name of Harris, at whose house there was to have been a dance that night. Late in the evening the son of Mr. Harris invited appellant and his brothers and sisters to the party. They declined to attend, claiming that because of the absence of their father and mother appellant and his family had to stay with his brothers and sisters. When invited, however, he asked if the deceased had been invited and would attend. Young Harris told him that he had not invited him, but that his father might have done so, and the inference is that appellant got the information or concluded that the deceased would attend the party. The deceased was not instantly killed, but lived for several hours after being shot, though was unconscious from the time he was shot until he died. Soon after the shooting the officers were informed of it, and the sheriff and one or more of his deputies and others went to the house where deceased had been shot. Shortly before day-light one of the deputies, who was unfamiliar with the localities and the residences of the various persons living in the community, but made inquiry at the time, and was informed who lived at the respective houses in the neighborhood, started out to see what he could hear and learn as to who the assassin was. He went from the house where deceased had been shot

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to several houses in the immediate vicinity, but upon approaching some of them he saw no light therein and heard no one moving about or talking, and passed on until he came to the house of appellant. There he found, just before day-light, that there was a light in appellant's house, and that persons were up and moving about and talking therein; he heard the voice of a woman and that of a man; he approached quite near to the house and heard some one of "the boys," as he expresses it, therein say, "I would like to know if Uncle Dock is dead." The deceased, as stated above, was named Dock Durham, and was the uncle of appellant and his brothers and sisters, and they called him Uncle Dock.

The day before the night of the killing appellant is shown to have worn a certain pair of shoes. One of these shoes had tacks projecting from the sole, and with it a certain track that could be and was unquestionably identified was made by the shoe. The next morning after the killing the night before, as soon as it became light enough to do so, the sheriff and said deputy sheriff and others undertook to learn where the party who did the killing stood, or was at the time of the shooting, and to track such person to and from this place. They thereupon found, right near the house where deceased was when he was shot, where some person or persons had stood and tramped around considerably at three distinct places; the farthest from the house was at an old outhouse some thirty yards from the window through which deceased was shot. The next place was some fifteen yards nearer, behind a large tree; the next place was at the fence some fifteen or twenty feet from the window through which the deceased was shot. These tracks were traced from towards appellant's house to these three respective places, and from the last, or one nearest the window through which deceased was shot, they tracked these tracks made by this particular shoe to appellant's house. They went in this house then, found these shoes under appellant's bed, took the shoes and fitted them to the said tracks, and they fit exactly. In other words, the witnesses testify positively that the tracks where the party stood, and from there to appellant's house, were made by this shoe, and that they fitted exactly. In appellant's house was also found a shotgun which had, as the witnesses testify, been recently shot, and with small buckshot. Deceased was shot with small buckshot.

While the sheriff and others who testified about the tracks showed that there were two tracks, one of the shoes of the other party made a peculiar track, and that while they hunted for shoes of Jewell Christie, they could find no shoe of his that would make this peculiar track. Only one shot was fired. Jewell was shown not to have a shotgun but a rifle. The evidence in no way identified or connected Jewell with certainty with the killing.

Neither appellant nor Jewell testified. Their defense was alibi. They had two of their sisters, and the wife of appellant to testify, which, if believed, would have probably established an alibi for both

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of them. This question was submitted properly by the court to the jury, and the jury found against appellant on this issue.

As stated above, the evidence is amply sufficient to sustain the conviction of appellant.

Appellant has but three bills of exception. His first bill, after the usual style of the cause and heading, says: "When C. J. Hunt was on the stand as a witness for the State, and had disclosed the fact that he was a resident of a distant county, and an entire stranger in this county, and counsel for defendants were seeking by questions to show who and what said witness was, and after said witness has remained silent and refused to answer such questions, the defendants' counsel asked said witness: 'Will you say that you are not a witness on the indictments against those different defendants for selling liquor?' to which the State objected because immaterial, and the court sustained such objection, to which defendant excepted." This is the whole of the bill except that then follows appellant's contention and reasons why he should have been permitted to ask said question and require an answer from the witness, to this effect: "Because it was a right, in cross-examination, to prove everything about the witness, and such testimony was material because by it would be shown that such witness was seeking to convict certain persons, and combination by him could be argued to secure evidence for his cases, by giving evidence in this case, and the defendant, if said evidence had been admitted, could have proven who were the other witnesses in such case, and if the prosecuting witnesses in this case were the prosecuting witnesses in the liquor cases, then it was strong evidence that there was such combination, but the court by its ruling closed all inquiry on this line."

The court in allowing this bill qualified it by stating that appellants' said argument or reasons why they should have been permitted to answer said question were for the first time presented to him by this bill long after the trial and the adjournment of the court for the term. Besides, the judge states fully in his qualifications the whole of the testimony of the witness on this point, and the ruling of the court, and the reasons therefor, which clearly show that no reversible error was committed by the court in sustaining the State's objection to said question as shown by said bill.

Another bill by appellant, after the style of the case and the usual heading, is "that on the trial of this case the court permitted C. J. Hunt to give it as his opinion that a person standing at a certain place designated could have shot Durham, the deceased, through a window." To which defendant objected because witness should have stated the different positions, and let the jury judge as to ability of one standing at such designated place to shoot Durham. But the court overruled the objection, and defendant excepted, and now tenders his bill.

This bill, as the other just above passed upon, was clearly insuffi-

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cient to require this court to review the questions attempted to be raised thereby. However, the court qualified this bill by showing fully that the witness did testify on this point, and clearly from it what he testified as objected to by the bill was merely a shorthand rendition of the facts so detailed by the witness, and no error whatever is shown by this bill. In addition to this, the State proved precisely the same thing by Mr. Phillips, the sheriff, without objection whatever by appellant. "It is well settled in this State that the erroneous admission of testimony is not cause for reversal if the same fact is proven by other testimony not objected to." Wagner v. State, 53 Texas Crim. Rep., 306, and cases there cited; West v. State, 2 Texas Crim. App., 460; Bailey v. State, decided at the present term.

No error whatever is shown by appellant's other bill of exceptions, wherein he claims that the court would not permit him to pursue the examination of the witness Sullivan on a point that the court clearly shows by the qualification of the bill and the quotation in full of the testimony of the witness on this point, that the point had been gone over and threshed out thoroughly, and the attempted continuation of the examination was a mere repetition of the same thing.

The judgment is affirmed. *Affirmed.*

W. E. Berry v. State.

No. 2387. Decided March 19, 1913.

Rehearing denied April 16, 1913.

1.—Illegal Hunting—Inclosures—Statutes Construed.

The Act of 1899 did not repeal Article 804, Penal Code, of the Act of 1895, and the Act of 1903 did not repeal the Act of 1899 with reference to hunting in inclosed lands of another.

2.—Same—Statutes Construed—Enclosure.

Article 804, Penal Code, of the Act of 1895 did not apply to inclosures of two thousand acres or more, as provided by Article 805, id.

3.—Same—Statutes Construed—No Repeal.

The Act of 1899 specifically states in section 4 that it does not repeal Articles 804 and 805, Penal Code of 1895, and section 2 of the Act of 1903 specifically provides that it does not apply to inclosures containing two thousand acres or more.

4.—Same—Statutes Construed—Posting—Pastures.

The law of 1903 provided that one who shall hunt within the enclosed lands of another containing less than two thousand acres without the consent of the owners shall be punished, while one who shall hunt within the inclosed lands of another containing more than two thousand acres, etc., shall also be punished; the distinction being that in inclosed lands of less than two thousand acres, the lands need not be posted, while in inclosures of two thousand acres or more, they must be posted.

5.—Same—Codification of Laws—Codifier Could Not Repeal.

The Legislature did not confer on the codifiers power or authority to enact or repeal any law under the Act of 1909, and when the codifiers brought

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forward the Act of 1903 and omitted the Act of 1899, said latter Act was not thereby repealed.

6.—Same—Statutes Construed—Statutes Not Repealed.

The Code prepared by the codifiers and adopted by the Legislature in 1911 did not in any provision thereof deal with hunting on inclosed lands of another of two thousand acres or more, and, therefore, did not repeal the Act of 1899, either expressly or by implication, and the same is still in full force and effect.

7.—Same—Precedent—Repeal by Implication Not Favored.

See opinion for discussion of rules of construction as to direct repeal and repeal by implication of statutes.

Appeal from the County Court of Medina. Tried below before the Hon. H. E. Haass.

Appeal from a conviction of unlawfully hunting in the inclosed lands of another, said inclosure being posted and containing more than two thousand acres; penalty, a fine of $5.

The opinion states the case.

V. H. Blocker, for appellant.—The Court erred in its opinion overruling appellant's contention in holding that the Acts of the Legislature of 1899 did not amend Article 804 of the Acts of 1895, as Sec. 4, Acts of 1899, expressly provided that nothing in said Act shall be construed to repeal the present law relating to enclosures of 2000 acres or less. The then present law referred to by Sec. 4 being Article 804 of the Acts of 1895, Penal Code, which said Act exempted from the operation of said law enclosures of 2000 acres, thereby providing that posting of the enclosures extended only to less than 2000 acres, which said Act would not conflict with Sec. 4 of the Act of 1899, in that said Act of 1899 intended to amend said Act of 1895 by extending the necessary prerequisite of that law "posting" of the enclosure beyond 2000 acres, or rather, was unlimited as to the number of acres in one enclosure; hence, virtually, the Act of 1899 took the place of the Acts of 1895, Article 804, by the addition of the Acts of 1899, which covered by "posting" all enclosures over 2000 acres. Dickinson v. State, 41 S. W. Rep., 759, and authorities there cited.

The Court committed error in construing the Act of 1895, Article 804, Penal Code, in that said Sec. 2 of said Act provides that said Act shall not apply to enclosures including 2000 acres in one enclosure; hence, reason and common sense will say that 2000 acres or more than 2000 acres in one enclosure is exempt from the provisions of the Act, which exact point, or vice, in the Act, was sought by the Legislature to be cured by the Act of 1899, by placing all enclosures over 2000 acres when "posted" under the ban of the Act of 1899.

The Court committed error in holding the Act of 1903 did not amend or repeal the Act of 1899, because said Act of 1903 by its very terms expressly excluded the question of "posting" all enclo-

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sures of less or more than 2000 acres, thereby making it an offense per se to hunt in an enclosure of less than 2000 acres without being posted, and no offense to hunt in an enclosure of more than 2000 acres. The clear distinction between the two Acts being the words "posting by the owner, etc.," as in the Acts of 1895 and 1899 (being vicious), the Legislature enacted the law of 1903, and by that Act cleared the law of such an erroneous wording as "posting" of the enclosure of less than 2000 or more than 2000 acres, and appellant here calls the Court's attention to the authorities and argument in his brief (pp. 4 and 5), which the appellant fears was inadvertently by the Court overlooked. See Dickson v. State, 41 S. W. Rep., 759; State v. Smith, 44 Texas, 443; Stebbins v. State, 22 Texas Crim. App., 32; Cain v. State, 20 Texas, 355; Ex Parte Cox, 53 Texas Crim. Rep., 240, 109 S. W. Rep., 369.

The Court committed error in its opinion in holding that the Acts of the Thirty-Second Legislature adopting the Revised Penal Code did not repeal all Acts heretofore made as the law, ("which includes the Acts of 1895 and 1899,") excepting such as were brought forward by the codifiers, for the reason the enacting bill providing for the adoption of the Code as revised by the codifiers specifically sets forth in Sec. 4 that "nothing in this Act shall be construed or held to repeal or in any wise affect the validity of any law or Act passed by this Legislature at its regular session," thereby *clearly* and *conversely* repealing all laws not brought forward by the codifiers, except such laws as were passed by the Thirty-Second Legislature of 1911, and appellant submits that the intent of the Legislature in adopting the Penal Code of 1911 as revised by the codifiers, can be better arrived at by this Court from the words used in the Act itself and the converse proposition thereof, than by the adopted form of past Legislatures * * *. The Act of adoption provides, Sec. 1, "that the following titles, chapters, and articles *shall* hereafter constitute the Penal Code of the State of Texas." Sec. 4 provides, "nothing in this Act *shall* be *construed* or held to *repeal* or in any wise affect the validity of any law or Act passed by this Legislature at its regular session." Clearly then, the intent of the Legislature, was to repeal all laws not included in the Revised Penal Code, which was then adopted as the Penal Code of Texas, except such as was or were passed by that Legislature at its regular session, although it does not in words expressly say that all laws not herein adopted are repealed.

C. E. Lane, Assistant Attorney-General, for the State.—The Act of 1903, page 159, which Appellant claims is in conflict with the Act of 1899, is a General Law, same being an amendment to Article 804 and 805, of the Penal Code of 1895, the Act makes it an offense to enter the enclosed lands of another—and therein hunt with firearms or therein catch or take any fish—or in any other manner depredate upon the same. It also provides that the same shall not apply to

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enclosures containing over 2000 acres. Both Acts can exist at one and the same time: Revised Penal Code 1895, 804 and 805; Acts 26th Legislature, 1899, page 173; Acts 28th Legislature, 1903, page 159; Acts 28th Legislature, 1903, page 193; Braun v. State, 49 S. W. Rep., 620, and cases cited; Ex Parte Keith, 83 S. W. Rep., 683; Parshall v. State, 62 Texas Crim. Rep., 177, 138 S. W. Rep., 759; State v. Duke et al., 137 S. W. Rep., 654; 36 Cyc. 1095 (Section "F").

Denman, Franklin & McGown, also for the State.—The Legislature in adopting the Revised Statutes of 1879 and of 1895, did in each case provide respectively as follows:

"Revised Statutes of 1879, Sec. 3. Be it further enacted, etc., that all penal laws and all laws relating to criminal procedure in this State, that are not embraced in this Act, and that have not been enacted during the present session of this Legislature, be, and the same are hereby repealed."

"Revised Statutes of 1895, Sec. 3. Be it further enacted, etc., that all penal laws and all laws relating to criminal procedure in this State, that are not embraced in this Act, and not enacted by the 23d Legislature and during the session of the Legislature adopting the Code, be, and the same are hereby repealed."

The Legislature in adopting said code in 1911, knew that the passage of the sections just above quoted, in the acts of 1879 and 1895, adopting the codes of those years respectively, had caused considerable trouble, because laws were omitted by oversight which were not intended to be repealed, but which in fact were repealed by the adoption of the sections just above quoted, and therefore the Legislature adopting said penal code in 1911, avoided the difficulty which had resulted from the adoption of said Sections 3 just above quoted by refusing to bring any such section into the act adopting the code of 1911.

We repeat that if the Legislature, in adopting said penal code in 1911, had intended to repeal all of the statutes passed from the date of the Revised Statutes of 1895, which might have been overlooked by the commissioners, they would have inserted a provision similar to the one just above quoted as having been inserted by the Legislature in the Act of March 17th, 1879, adopting the code of 1879, and in said Act adopting the code of 1895, and the failure to follow the precedent established by the Legislature in 1879 and 1895, in adopting the codes of those years, shows that the Legislature in 1911 did not intend, by adopting said penal code of 1911 to repeal any criminal law which might have been omitted or overlooked by the codifiers in collecting the statutes therein.

Again, said penal code of 1911 was adopted at the regular session of the Thirty-second Legislature, and said Thirty-second Legislature, at the same session, passed an act, approved March 11th, 1911 (Acts of Regular Session, page 90), amending said Act of 1899, with reference to hunting by providing that it should be in force in all the

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counties of Texas except Upton County, and repealing all laws, and parts of laws in conflict with the provisions of such Act amending the Act of 1899.

Now, it is a well-settled rule of construction of this State that all the Acts of a Legislature, passed at a given session, must be construed together as if constituting one Act, and so construing them it is inconceivable that a construction can be adopted which would hold that the Legislature at its regular session, in 1911, adopting said penal code, could have intended thereby to repeal the hunting Act of 1899, when it, at the same time, passed the Act just referred to, amending and putting in force such hunting Act of 1899 in all the counties of the State except Upton and repealing all laws in conflict with such last Act putting the hunting Act in force in all the counties except Upton.

When we remember that it is the purpose of the court simply to find out whether the regular session of the Legislature of 1911 intended to repeal said hunting Act of 1899 by simply omitting it from the penal code, an omission which evidently resulted from an oversight it is clear that the courts will hold, from the Acts of the Legislature above recited, that the Legislative intent was that the commissioners should include said Act of 1899 in the penal code along with all other acts of a criminal nature passed since the Revised Statutes of 1895, and that the omission thereof from the penal code is not evidence of an intention to repeal said Act of 1899.

Act providing for revision of the Civil and Penal Code, approved March 19th, 1909, page 130.

Act adopting the Penal Code of the State of Texas passed at regular session Thirty-third Legislature, 1911.

Act approved March 11th, 1911, at regular session of the Thirty-second Legislature, amending said Hunting Law so as to leave it in effect in all the counties of the State of Texas except Upton. Page 90 said Sessions Acts. Cain v. State, 20 Tex., 355; Flores v. State, 53 S. W., 346; Phipps v. State, 36 S. W., 753; Ex Parte Cox, 53 Texas Crim. Rep., 240; Braun v. State, 49 S. W., 620.

Section 3 of the Act approved March 17th, 1879, adopting the Penal Code and Code of Criminal Procedure of the State of Texas, found on page 157 of the Code of Criminal Procedure.

Section 3 of the Act adopting the Penal Code and Code of Criminal Procedure of the State of Texas, passed in 1895, found on page 182 of the Code of Criminal Procedure of 1895.

Searcy & Browne, also for the State.—This Act was passed in May, 1899, and is an Act to promote agriculture and stock raising. It was amended by the Legislature of 1903, page 193 Sessions Acts, so as to include the counties not before included within its provisions. It was further amended in the same particular in 1905, page 98 of the Sessions Acts. It was further amended in the same particular in 1907, page 190 of the Session Acts. It was further amended in the

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same particular in 1909 on page 58 in the Session Acts, on page 135 of the Session Acts. It was amended in the same particular in 1911, page 90 of the Session Acts. This original Act is not an amendment to any existing law, nor to any part or article of the Penal Code.

You will notice that the codes of 1879 and 1895 when adopted, provided absolutely that the fact that any act was omitted from that code should repeal that Act, but the code of 1911 has not such provision, and this we think is a plain statement that it is not intended for any omission to effect a repeal, for the three codes are substantially identical as to the provisions in regard to their adoption, except for this difference.

But the Legislature which passed the Act of 1899 left no doubt as to what they intended its statutes to be among the laws on the same subject. In Sec. 4 of said act there is the express provision that that act should not repeal or in any way affect Arts. 804-805 in the Penal Code.

We think that from a consideration of the law of this State, as it now is and from a consideration of the decisions of the courts of this State discussing the various revisions of our Statutes that it will occur to any lawyer that the fact that the codifiers in revising the laws of 1911 failed to incorporate in that revision the hunting Act of 1899 could not in any possibility repeal that Act. Cain v. State, 20 Texas, 355; Phipps v. State, 36 Texas Crim. Rep., 216; Crawford v. State, 39 S. E. Rep., 372; Braun v. State, 49 S. W. Rep., 620; Ex Parte Beverly, 34 Texas Crim. Rep., 644; Ratigan v. State, 33 Texas Crim. Rep., 301; State v. Larkin et al., 90 S. W. Rep., 912; Ex Parte Cox, 53 Texas Crim. Rep., 240, 109 S. W. Rep., 369; Heil v. Martin, 70 S. W. Rep., 430; Flores v. State, 53 S. W. Rep., 346.

HARPER, JUDGE.—Appellant was prosecuted and convicted of hunting in inclosed lands of another, said inclosure being posted and containing more than 2000 acres. Appellant admitted that the pasture was inclosed, posted and contained more than 2000 acres of land in the inclosure, his whole contention being that no law of this State made it an offense to hunt in such an inclosure.

His first contention is that the Act of the Legislature of 1899, repealed Article 804 of the Penal Code, Acts of 1895, and that the Act of the Legislature of 1903, repealed the Act of 1899. By reference to the Acts it will be seen that Article 804 of the Code of 1895, did not apply to inclosures of 2000 acres or more (Art. 805). The Act of 1899 specifically states in Sec. 4 that it does not repeal Articles 804 and 805 of the Code of 1895, and Sec. 2 of the Act of 1903, specifically provides that it does not apply to inclosures containing 2000 acres or more. So the first contention can not be sustained, and we find that the laws of this State in 1903, provided that one who shall hunt within the inclosed lands of another, containing less than 2000 acres, without the consent of the owner, shall be

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punished by a fine not less than $10 nor more than $100; while one who shall hunt within the inclosed lands of another, containing more than 2000 acres, without the consent of the owner, which land has been posted, shall be punished by a fine not exceeding $200. The distinction in the two acts being that in inclosed lands of less than 2000 acres the lands need not be posted, while in inclosures of 2000 acres or more, at each entrance, the owner must conspicuously notify the public that it is "posted,"—the punishment varying. This is a proper distinction and classification, and neither Act repealed the other.

The other question raised may be said to be one of more difficulty. In 1909 the Legislature provided for a codification of the laws, but no one, we think, can contend that the Legislature conferred on this codifying board or commission power or authority to enact or repeal any law, and, it did not attempt to do so. The only question in this case is, whether the Legislature in adopting the report of this codifying board, or commission, did repeal any law theretofore legally adopted by the Legislature. The codifying commission brought forward in the Code, arranged by them, the Act of 1903, and numbered it Article 1255 and entirely omitted from this Code, so prepared, the Act of the Legislature of 1899, which applied to inclosures containing 2000 acres or more.

In 1911, the Legislature enacted this Code by bill, providing: "Sec. 1—That the following titles, chapters, and articles, shall hereafter, constitute the Penal Code of the State of Texas. Sec. 4—Nothing in this Act shall be construed or held to repeal, or in anywise effect the validity of any law or Act passed by this Legislature at its regular session." Thus it is seen that the laws passed by the Legislature, assembling in January, 1911, were specifically exempted from repeal, but no other Acts were so specifically exempted. The Act punishing hunting or for fishing on the inclosed posted lands of another, containing 2000 acres or more, was passed in 1899, and the Code prepared by the codifiers and adopted by the Legislature in 1911, did not in any provision thereof, deal with hunting on inclosed lands of another of 2000 acres or more. The code or bill as enacted did not specifically repeal this law, but it did provide that the "titles, chapters, and articles shall hereafter constitute the Penal Code." Thus it is seen that if the Act of 1899 is repealed, it is repealed by implication, and by no specific provision of the Code or act of the Legislature. No one had the authority to repeal except the legislative body of this State. In that excellent work, 36 Cyclopedia of Law, page 1071, it is said:

"A legislature may express its will in any form—affirmative or negative—that it pleases, so long as it does not transgress constitutional prohibitions. It is under no obligation to use words of express repeal. But the repeal of statutes by implication is not favored by the courts. The presumption is always against the intention to repeal

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where express terms are not used. To justify the presumption of an intention to repeal one statute by another, either the two statutes must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed. It follows that where the intention not to repeal is apparent or manifest from an Act there is no room for repeal by implication, or the application of rules regarding implied repeal,'' citing authorities from Alabama, California, Colorado, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Pennsylvania, Tennessee, Virginia, Washington, Wisconsin, and other States, showing that the great weight of authority favors the rule as thus announced.

In 26 American & English Encyclopedia of Law, pp. 717 et seq., it is said:

''An express repeal of a statute may be accomplished, as the term implies, only by positive enactment. Therefore, a recital in the title of an Act that its purpose is to repeal a previous Act is not of itself sufficient for that purpose, because the title is not an operative part of the Act. There must be a repealing clause in the body of the statute. But, inasmuch as the question of repeal is always one of legislative intent, an express declaration that a particular statute is repealed will not be given effect where it is apparent that the Legislature did not so intend.

''Where an Act is passed covering the whole of a particular subject or field of legislation, it is customary to insert a general clause repealing 'all Acts or parts of Acts inconsistent therewith,' and such a clause is effective in repealing inconsistent enactments, in the absence of any constitutional prohibition against such method of repeal; but the repeal extends only to those Acts on the same subject or parts of such Acts clearly inconsistent and irreconcilable with the provisions of the repealing Act, and only to the extent of the conflicting provisions.

''A statute is repealed by implication whenever it becomes apparent from subsequent legislation that the Legislature does not intend the earlier Act to remain in force, and the converse of this proposition is that no statute will operate as an implied repeal of an earlier statute, if it appears that the Legislature did not intend it so to operate. Though repeal by implication is not favored, it necessarily results in any case of repugnancy or inconsistency between two successive statutes, or in any case where the intention of the Legislature is manifest that a later statute should supersede an earlier one.

''Repeals by implication are not favored, and will not be indulged unless it is manifest that the Legislature so intended. As laws are presumed to be passed with deliberation and with full knowledge of all existing laws on the subject, it is but reasonable to conclude that in passing a statute it was not intended to interfere with or abrogate any former law relating to the same matter, unless the later Act is

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either repugnant to the earlier one, or fully embraces the subject-matter thereof, or unless the reason for the earlier Act is beyond peradventure removed," citing authorities from almost every State in the Union. There being in the Code of 1911, no express repeal of the Act of the Legislature of 1899, and no provision of the Code of 1911 dealing with the subject of the Act of the Legislature of 1899, we are of the opinion that the Act of the Legislature adopting the codification of the laws as prepared by the commission, did not repeal the Act of 1899, and it is still in full force and effect.

Had the Act of the Legislature in adopting the codification contained an express repealing clause, or had the Code as thus adopted dealt with the subject of hunting in inclosures containing 2000 acres or more, a more difficult question might have been presented. But as the Code prepared by the codifiers, does not deal with this subject, and there is no express repealing clause contained in the Act adopting this code, we are of the opinion that the Act of 1899, punishing persons for hunting in the inclosed posted lands of another, containing 2000 acres or more, has not been repealed and the Act of 1899 is in full force and effect, and being of this opinion, the judgment is affirmed.

Excellent briefs have been filed in this case by Denman, Franklin & McGown, and Searcy & Browne, and they have been of very material aid to us, and they will be published in connection with this opinion.

Affirmed.

[Rehearing denied April 16, 1913.—Reporter.]

R. M. TODD V. STATE.

No. 2308. Decided March 19, 1913.

1.—Occupation—Local Option—Talesman—Sheriff.

Where the sheriff was not disqualified to summon jurors in the case, the judge of the court was not authorized directly or indirectly to set him aside, as such officer, and appoint a private citizen to discharge the duties of sheriff in summoning talesman, and the same was reversible error; and the fact that the sheriff may have had a heated campaign for renomination did not disqualify him to summon jurors.

2.—Same—Evidence—Agreement in Other Case.

Upon trial of unlawfully pursuing the occupation of selling intoxicating liquors in local option territory, it was reversible error to introduce in evidence an agreement between defendant and the county attorney in another case, in which defendant was charged with violating the local option law, and which agreement provided that defendant would not engage in the business of selling intoxicating liquors in the county of the prosecution while local option was in force in said county, etc., all of which had no connection with the instant case.

3.—Same—Charge of Court—Limitation.

Where the charge of the court authorized the jury, with reference to the question of limitation, to convict for any offense that may have been com-

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mitted more than three years prior to the time the indictment was presented, the same was error.

4.—Same—Charge of Court—Intoxicating Liquors—Beer.

In the absence of proof on the subject as to whether beer was intoxicating or non-intoxicating, the court judicially knows and determines that beer is an intoxicant. Following Moreno v. State, 64 Texas Crim. Rep., 660, and other cases. Davidson, Presiding Judge, dissenting.

Appeal from the District Court of Young. Tried below before the Hon. P. A. Martin.

Appeal from a conviction of engaging in the business and occupation of selling intoxicating liquors in local option territory; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

M. M. Brooks and *Kay & Akin*, for appellant.—On the question that it must be proved that beer is an intoxicating liquor: Schwulst v. State, 108 S. W. Rep., 698; Potts v. State, 50 Texas Crim. Rep., 368, 97 S. W. Rep., 477; Racer v. State, 73 S. W. Rep., 807.

C. E. Lane, Assistant Attorney-General, for the State.—Cited cases in opinion.

DAVIDSON, PRESIDING JUDGE.—Appellant was convicted of pursuing the business of selling intoxicating liquors in local option territory.

1. When the case was called for trial the district judge stated to the sheriff that there were certain criticisms that the court thought would be made against the sheriff in case he, the sheriff, summoned the talesmen, and suggested to the sheriff that he ought not to select the talesmen; whereupon the sheriff did not select talesmen and the court swore one Bill Johnson who was not an officer and who was not authorized to summon jurors, to select talesmen, which he proceeded to do, bringing into court as talesmen extreme prohibitionists living in and around Graham and entertaining, as shown in bill of exceptions No. 1, prejudices and opinions against defendant's business. Appellant exhausted his peremptory challenges and was not aware of these matters occurring between the sheriff and the district judge until after the selection of the jury and did not challenge the talesmen on account of such matters. The court qualifies the bill by stating that he had been informed by the sheriff, who had recently been through a primary election and had been renominated, that certain parties had accused him of standing in with Todd and failing to do his duty in the enforcement of the local option law. The court had heard these statements from various sources. So when it became necessary to summon some talesmen to fill out the jury, the court suggested to the sheriff, that if he, the court, were in his place, he would have one of his deputies perform this service in this case. This, the court did, as a friendly suggestion to Mr. Brown. Mr. Brown then asked

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the court to swear in Mr. Johnson to perform this duty. The court further states that Mr. Johnson is an estimable citizen of the county and had been attending the court, etc. The court states as to whether the talesmen summoned were or were not prohibitionists, that some of them were and some were not prohibitionists; but all the talesmen summoned, in the opinion of the court, were fair and impartial men. We are of opinion that this bill shows such error that for this reason this conviction ought not to be permitted to stand. The sheriff of the county is elected to serve the process of the court and to do other things incumbent upon him as sheriff, and the fact that he may have been through a heated campaign and won his renomination is no reason why he should have been disqualified to summon talesmen. It has not been provided with reference to this officer that it shall be a disqualification to the discharge of the duties of his office, that his race may have been more or less heated for nomination or election. If this were true the bulk of the officers of Texas would be disqualified from discharging the duties of their offices. There must be something more than this. Our Constitution and laws, either or both, have provided instances in which officers may be disqualified. This is usually by relationship, by consanguinity or affinity or interest of some sort in the case under investigation. The sheriff of Young County was not disqualified to summon jurors in the case, and the judge of the court was not authorized, directly or indirectly, to set him aside as such officer and appoint a private citizen or any other, to discharge the duties of sheriff because of the fact that he may have had a heated campaign for renomination.

2. There is another question presented by bill of exception, towit; that appellant entered into an agreement with the county attorney in another case in which he was charged with violating the local option law,—first, that that case should be continued indefinitely as provided in subsequent provisions of the agreement; second, that appellant agreed that he would not engage in the business of selling intoxicating liquors in Young County while local option was in force in said county; third, that he would not keep intoxicating liquors on hand or about his premises for sale and would not allow the same to be kept or sold by others, and that he would not order the same for others, and that the sheriff of Young County could at any time examine his place of business and if any quantity of intoxicating liquors should be found thereupon or thereabouts this agreement should be held to be a plea of guilty to the case above mentioned; fourth, that if appellant should be hereafter convicted of selling intoxicating liquors, then this agreement should be held and be a plea of guilty to the cause above mentioned; that the cause above styled and numbered shall be held to be suspended so long as appellant does not break the agreement. This was entered into and agreed to and signed by appellant and Fred T. Arnold, as county attorney. Many objections were urged against the introduction of this agreement: First, that it was

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made in another case in the County Court; second, that it contained no admissions or declarations; third, that from such instrument the jury might infer in a general way that the defendant had previous to such an agreement been violating the law; fourth, because the court failed to limit the agreement as to time; fifth, because it was incompetent, immaterial and irrelevant; sixth, because its use and admission was an act of bad faith on the part of the State; seventh, because no sales were shown by any testimony to have been made after the making of said agreement; eighth, because the same was highly prejudicial to the defendant and the court overruled the objection and admitted it. It is unnecessary and would serve no useful purpose to take up these grounds of objection seriatim. This agreement had no place in this case. That it was detrimental to the defendant is not to be questioned. We can not understand what the agreement appellant had with the county attorney in a case in the County Court for violating local option law, could have to do with a case in the District Court for pursuing the business of selling intoxicants without license. He was never tried in the County Court, so far as this agreement is concerned, and if he had been tried and convicted, this agreement would not be admissible against him in this case. A conviction could have been nothing but the verdict of the jury,—just the expression of an opinion and conclusion of a jury on the facts before them in another case.

3. Another question is suggested for reversal in regard to the charge of the court. This charge instructs the jury that if appellant, about the time charged in the indictment, and prior to September 12, 1912, which was the time of the filing of the indictment, and subsequent to the first day of August, 1909, unlawfully engage in and pursue, etc., they should find him guilty. This charge was error because it authorized the jury with reference to the question of limitation, to convict for any offense that may have been committed more than three years prior to the time the indictment was presented in court. While this may not have been a very serious matter in this particular case, yet where an offense is barred by a certain number of years, the court should not authorize a conviction for a longer period than that fixed by the statute as limitation.

4. The court charged the jury that whisky and beer are intoxicating liquors and their sale is prohibited under the provisions of the prohibition law of Young County. There was no evidence introduced that the "beer" was an intoxicant. The writer is clearly of the opinion that this charge was error. Under the Constitution, as well as the statute, before a person can violate the local option law in any of its provisions, the sale must be of intoxicating liquors. It is so provided by the Constitution, and the State must prove, in order to secure the conviction, that the party was selling intoxicants. The statute under which the defendant was indicted, provides that if appellant pursued the business, etc., of selling intoxicants, where

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he is not by law authorized, he shall be guilty. The majority of the court in the Moreno case, 64 Texas Crim. Rep., 660, 143 S. W., 156, held that this court, in the absence of proof on the subject as to whether beer was intoxicating or non-intoxicating, would judiciously know and determine that beer was intoxicating. The writer can not agree to that, but under that authority this portion of the charge would not be error. In this particular case that was important, because appellant, if he violated the law under the facts, it was by reason of the fact that he sold one bottle of whisky and one bottle of beer. There is no evidence in the record to show whether the beer was a non-intoxicating or an intoxicating beverage. The writer dissented in the Moreno case, as he did in the Ex Parte Townsend case, 64 Texas Crim. Rep., 350, 144 S. W. Rep., 628, in regard to those matters and it is unnecessary to discuss them further here. The opinion of the majority as well as the dissenting opinion are shown in those cases.

For the errors indicated the judgment is reversed and the cause is remanded.

The majority adhere to the opinion in Moreno case as laying down the correct doctrine. They agree to the other propositions as decided.

Reversed and remanded.

JIM COWAN V. STATE.

No. 2362. Decided March 19, 1913.

Local Option—Information—Date of Offense.

Where the evidence showed that the offense was committed four days after the complaint and information were filed, the conviction could not be sustained.

Appeal from the County Court of Nolan. Tried below before the Hon. John H. Cochran.

Appeal from a conviction of a violation of the local option law; penalty, a fine of $25 and twenty-five days confinement in the county jail.

The opinion states the case.

W. E. Ponder, for appellant.—Cited Munford v. State, 35 Texas Crim. Rep., 237; Blake v. State, 3 Texas Crim. App., 149.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was charged by complaint and information with a misdemeanor. The complaint was filed on the 14th of June, 1912, charging the offense was committed on the 13th of June, prior to making the affidavit. The information predicated upon the complaint was filed June 14th, and follows the

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allegations in the complaint. The violation is charged to be against the local option law, and Cook, the alleged purchaser, says that on the 18th of June, 1912, he bought a pint of whisky from appellant. This offense, under Cook's testimony, was committed four days after the complaint and information were filed. The complaint must allege an offense committed prior to its being sworn to and filed.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

WALTER SCOTT V. STATE.

No. 2351. Decided March 19, 1913.

Gaming—Betting at Dice—Sufficiency of the Evidence.

Where, upon trial of betting at dice, the evidence showed that the defendant threw the dice and put up his money, the conviction was sustained, although the State's witness did not remember any specific bet made by the defendant, there being several engaged in the throwing of dice.

Appeal from the County Court of Hamilton. Tried below before the Hon. R. Q. Murphree.

Appeal from a conviction of gaming by betting at a game of dice; penalty, a fine of $10.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was convicted of betting at dice. A jury was waived and the case was tried before the court.

The only question raised in the motion for new trial is based upon the alleged insufficiency of the testimony to support the finding of the court. The testimony is from one witness only, and to the effect that the witness Smith, appellant and two others, Cole and Simmons, were present at a game of craps, and all bet money on the game. Quoting the language of the witness: "We all bet money on the game. I suppose Walter Scott bet on the game. We played with dice. The game we played is commonly called craps. We all bet on the game. I am positive that we all bet on the game. We bet money. There were four of us and we all bet." On cross-examination he was asked if he had any specific recollection that Walter Scott bet on the game. His answer was that he was there present. "But do you not know whether he bet or not? A. I don't know whether he bet directly with me. Q. Do you remember positively that he did bet, and have a specific recollection of any bet? A. No, I haven't any recollection of any bet. Walter Scott, Billy Cole, Acquilla Simmons and myself

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is all I remember of being present." On re-direct he says: "I do not remember any specific bet, but he put down his money. I do not remember any specific bet I made. I remember his throwing the dice and putting up his money." This is the testimony, and upon this the judge based his conclusion of guilt. We would hardly feel justified in reversing the judgment on this testimony. The matter was submitted to the court, and he heard the witness, and under this testimony we are of the opinion that the judgment should be affirmed.

Affirmed.

WALTER SCOTT V. STATE.

No. 2352. Decided March 19, 1913.

1.—Gaming—Date of Offense—Sufficiency of the Evidence—Limitation.

Where, upon trial of betting at a game of dice, no other reasonable conclusion could be reached by the evidence, as a whole, than that the offense was committed on or about the date alleged in the information, and no question of limitation having been raised by the evidence, the convistion was sustained.

2.—Same—Gaming—Dice—Private Residence—Definition of Offense.

To bet at a game of dice is unlawful wherever the game occurs. It is only a game with cards and dominoes that is no offense when played at a private residence occupied by a family.

3.—Same—Venue—Bill of Exceptions.

Where, upon trial of playing dice, the venue was clearly proved, there was no error; besides, in the absence of a bill of exceptions, the question of venue could not be passed upon on appeal.

Appeal from the County Court of Hamilton. Tried below before the Hon. R. Q. Murphree.

Appeal from a conviction of gaming by betting at a game of dice; penalty, a fine of $5.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—Upon a proper complaint and information, charging that on or about May 1, 1912, appellant, in Hamilton County, Texas, did unlawfully bet and wager money upon a game of dice, appellant was convicted, from which he appeals. He waived a jury, and the cause was tried before the court. There was no motion other than for a new trial, and no bills of exception in the case. The facts are undisputed and establish the offense charged.

Four witnesses for the State testified, each, in substance, stating that appellant, with others, bet at a game of dice, a half or three-

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quarters of a mile up the Bosque river from Hico. No witness specifically testified that this occurred on May 1, 1912. The offense was charged to have been committed, as stated, on or about May 1, 1912. Each witness testified that it occurred in the spring, some stating about April, and others about May, but each, in substance, that it was about May 1st. No other reasonable conclusion could be reached by the testimony as a whole than that the offense was committed on or about May 1, 1912. No question of limitation is in any way raised.

To bet at a game of dice is unlawful, wherever the game occurs. It is only games played with cards and dominoes that is no offense when played at a private residence occupied by a family. One witness testified positively that the game was played in Hamilton County, Texas; the others that it was about a half or three-quarters of a mile from Hico, and that the county line between Hamilton and Erath was about three-quarters to a mile from Hico. The venue was clearly proven. But if not, it not being objected to and shown by a bill of exceptions, would not be presented so that we could pass upon it.

The judgment is affirmed.

Affirmed.

WILL BROADNAX V. STATE.

No. 2356. Decided March 19, 1913.

1.—Selling Intoxicating Liquors Without License—Information.

Where, upon trial of selling intoxicating liquors in non-local option territory without license, the information followed approved precedent, there was no error in overruling a motion to quash. Following Gill v. State, 67 Texas Crim. Rep., 585.

2.—Same—Charge of Court—Requested Charges.

Where the court's main charge, and the requested charges submitted, presented every phase of the law applicable to the evidence, there was no error in refusing further requested charges.

Appeal from the County Court of Dallas County at Law. Tried below before the Hon. W. F. Whitehurst.

Appeal from a conviction of selling intoxicating liquors without license; penalty, a fine of $200 and twenty days' confinement in the county jail.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was prosecuted under complaint and information charging him with selling intoxicating liquors in territory where prohibition is not in force, without having obtained a license to sell such liquors.

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Appellant moved to quash the complaint and information on the same grounds which were discussed in the case of Gill v. The State, 67 Texas Crim. Rep., 585, 150 S. W. Rep., 616, and the court did not err in overruling the motion.

There were no exceptions reserved to the introduction or exclusion of testimony, but complaint is made of the failure of the court to give some special instructions requested. The court in his main charge and in the two special charges given at the request of appellant presented every phase of the law applicable to the evidence, and it was wholly unnecessary to give any of the other requested charges.

The judgment is affirmed.

Affirmed.

W. KELLY V. STATE.

No. 2364. Decided March 19, 1913.

Theft from Person.

In the absence of a statement of facts, a refusal to grant a continuance and new trial on account of the newly discovered evidence, cannot be considered on appeal.

Appeal from the Criminal District Court of Galveston. Tried below before the Hon. Robt. G. Street.

Appeal from a conviction of theft from the person; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was convicted of theft from the person, his punishment being assessed at two years confinement in the penitentiary.

The record is before us without a statement of facts or bill of exceptions. The motion for new trial complains, first, that the case ought to have been continued. There was no bill of exceptions reserved to the action of the court refusing to postpone or continue the case. Second, on account of newly discovered evidence. Without the evidence before us we are unable to intelligently revise this matter. As the record presents the appeal to this court we find no reversible error, and the judgment is ordered to be affirmed.

Affirmed.

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EDWIN COBB V. STATE.

No. 2320. Decided March 19, 1913.

Occupation—Intoxicating Liquors—Local Option—Escape—Affidavit.

Where, upon appeal from a conviction of pursuing the occupation of selling intoxicating liquors in local option territory, the affidavit of the sheriff accompanying the record showed that appellant had escaped from jail and not voluntarily returned within ten days from date of escape, the appeal must be dismissed.

Appeal from the District Court of Fannin. Tried below before the Hon. Ben H. Denton.

Appeal from a conviction of pursuing the occupation of selling intoxicating liquors in local option territory; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—In this case appellant appeals from a judgment adjudging him guilty of pursuing the occupation of selling intoxicating liquors in prohibition territory.

Accompanying the record is the affidavit of the sheriff of Fannin County testifying that appellant escaped from jail, pending this appeal, and that he did not voluntarily return within ten days from date of his escape. Consequently the motion of the Assistant Attorney-General to dismiss the case is sustained.

The appeal is dismissed.

Dismissed.

A. R. IRBY V. STATE.

No. 2353. Decided March 19, 1913.

Rehearing denied April 16, 1913.

1.—Embezzlement—Monogram—Check—Variance.

Where the check described in the indictment for embezzlement and that introduced in evidence were exactly alike, except the check introduced had the monogram of the bank printed in the upper left-hand corner, which was not descriptive of the check, there was no variance. Following May v. State, 15 Texas Crim. App., 430.

2.—Same—Evidence—Letters—Date of Offense.

Where defendant on trial of embezzlement objected to the introduction in evidence of certain letters because they were written after the date of the offense alleged in the indictment, but the record showed that they were all written prior to the date of the finding and filing of the indictment and were within the period of limitation with reference to the offense, there was no error.

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3.—Same—Evidence—Letters.

Where, upon trial of embezzlement, a certain letter would not have been admissible if a proper objection had been raised, but the objection thereto was with reference to the date of the letter, which was immaterial, there was no error.

4.—Same—Evidence—Letters.

Where the money alleged to have been embezzled was delivered to defendant to pay a balance due to the State on land, and the letter written by the defendant, which was introduced in evidence, pretended to enclose a receipt for said money, such letter was admissible in evidence to throw light on defendant's intent to embezzle the money when he deposited it in his own name.

5.—Same—Date of Offense.

Upon trial of embezzlement, the State was not restricted to its proof of the date of the offense to the identical date alleged in the indictment, as long as the same was within three years prior to the filing of the indictment. Following Knight v. State, 64 Texas Crim. Rep., 541.

6.—Same—Evidence—Facts Brought Out by Defendant.

Where the State did not bring out the testimony with reference to a statement made to the witness by a cashier of the bank, but the same was brought out by defendant without objection and was then excluded by the court, there was no error.

7.—Same—Continuance—Bill of Exceptions.

In the absence of a bill of exceptions to the action of the court in overruling a motion for a continuance, the same cannot be reviewed on appeal.

8.—Same—Indictment—Motion for New Trial.

Where the indictment followed approved precedent in a trial of embezzlement, there was no error; besides there was no motion to quash in the record.

9.—Same—Charge of Court—Felony—Misdemeanor.

Where, upon trial of embezzlement, the evidence showed that the defendant embezzled money over the value of $50 at one time within the time alleged in the indictment, there was no error in the court's failure to submit a charge on misdemeanor embezzlement.

Appeal from the District Court of Comanche. Tried below before the Hon. J. H. Arnold.

Appeal from a conviction of embezzlement; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Callaway & Callaway, for appellant.—On question of insufficiency of indictment: Huddleston v. State, 11 Texas Crim. App., 22; Baker v. State, 14 id., 332; Edgerton v. State, 70 S. W. Rep., 90; Fischl v. State, 54 Texas Crim. Rep., 55, 111 S. W. Rep., 410; Feeney v. State, 58 Texas Crim. Rep., 152, 124 S. W. Rep., 944; Simmons v. State, 61 Texas Crim. Rep., 7, 133 S. W. Rep., 687.

On question of introducing letters not written by defendant: Cline v. State, 36 Texas Crim. Rep., 320; Childers v. State, 30 Texas Crim. App., 160; Chester v. State, 23 id., 577.

On question of value of money embezzled: Stalling v. State, 29

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Texas Crim. App., 220; Cody v. State, 31 Texas Crim. Rep., 183; Knight v. State, 13 S. W. Rep., 598; Loving v. State, 71 S. W. Rep., 277.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant was convicted of embezzlement and his punishment assessed at two years confinement in the State penitentiary.

In the first bill of exceptions appellant complains that the court erred in admitting in evidence the check given by W. C. Dukes to him for $163.50 on account of an alleged variance. The check described in the indictment and the check introduced in evidence are exactly alike, except the check introduced in evidence had the monogram of the bank printed in the upper left-hand corner. This neither added to nor took from the check anything of value, nor was it descriptive of anything in the check. In a case of embezzlement this is not such a variance as would preclude its admissibility in evidence. May v. The State, 15 Texas Crim. App., 430.

Another bill of exception reads as follows: "Be it remembered that upon the trial of the above styled and numbered cause, the district attorney offered in evidence six or eight letters, as set out in full in the statement of facts filed herein, which statement of facts is hereby referred to and the letters as therein set out are made a part hereof, all of which letters were dated after the 4th day of January, A. D. 1912, the date upon which the embezzlement took place as alleged in the indictment, to the introduction of all of which the defendant then and there in open court objected for the reason that said letters were dated after the 4th of January, the day upon which the embezzlement is alleged in the indictment to have taken place and that all of said letters were written and received after the alleged crime had taken place, and could in no way affect the transaction that had already occurred; they were therefore not admissible. They were highly prejudicial to the defendant's cause, because they might and would strongly tend to cause the jury to believe that at any time after the said date if the defendant should have formed the intention to take and use the said money, that they could and should convict him, just the same as though he had embezzled the money on or before the said date, when in law he could not be convicted on this indictment for any crime he may have committed after the said date alleged in the indictment." It is thus seen that the only ground urged on the trial, to the introduction of these letters in evidence was that they were written after the date alleged in the indictment when that offense occurred, etc. The letters were all written prior to the date of the finding and filing of the indictment in this cause, and as the date alleged in the indictment as the date of the offense is not a material allegation, as the offense may be proven to have occurred at any time

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prior to the filing of the indictment within the period of limitation, the objection made would not preclude the introduction of the letters. However, we have read all the letters introduced, and they were all written by appellant, (except one) and the letters written by appellant were properly admitted, as they would tend strongly to show whether or not appellant intended to embezzle the check or the money received thereon. As to the letter written by Mr. J. T. Robinson to Mr. Dukes, it would not have been admissible if objected to and the proper objection made. The court, in approving the bill (which is accepted and filed by appellant) states that the only letters objected to were the ones written by appellant. The letters written by appellant were properly admitted in evidence, for they throw light on the issue on trial. The money was delivered to appellant to pay a balance due to the State on land, and in one of the letters he says: "Rising Star, March 5th, 1912. Mr. W. C. Dukes, Duster, Texas. Dear Mr. Dukes: —Will you please find enclosed receipt from the land office in payment of you balance that you owed on your land. Will be glad to get the matter closed up, but I am at a loss to know how to get things in a better shape. Wishing you all kinds of success, and that we will get things closed up at an early date, I am, yours very truly, A. R. Irby." As the record discloses there was no receipt in the letter, and in fact he had not paid the State the money, nor ever received any receipt. It can be seen how this letter would throw light on whether or not appellant intended to embezzle the check or money when he deposited it in his own name. But if the court should be wrong in stating that the only letters objected to were the letters written by appellant, and appellant did object to the letter written by Mr. Robinson, being admitted in evidence, if the only objection urged was that the letter was written after the date alleged in the indictment, the court would not err in overruling such an objection. Appellant seems to proceed on the theory that the State was tied to the date January 4th, and appellant could not be convicted unless it was shown the embezzlement took place on that date. But the indictment was not returned until October 18, 1912, and while it did allege that the offense was committed on or about January 4, 1912, yet, the State was not restricted to its proof on that identical day, but could prove any date prior to October 18, (the day of the filing of the indictment), so that such date was within three years prior thereto. Knight v. The State, 64 Texas Crim. Rep., 541, 144 S. W. Rep., 967. As heretofore stated, if the proper objection had been urged this letter should not have been admitted, but the trial court is only called on to pass on the objection made, and this court merely passes on whether he erred in passing on that objection.

The third bill of exceptions states that Mr. Dukes was permitted to testify to a statement made to him by the cashier of the bank at Rising Star. Of course, the State could not make such proof; it would be hearsay, pure and simple, in the absence of appellant. But in

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approving the bill the court states: "I can not approve this bill of exceptions as the same is presented to me for the reason that the same does not correctly show how the matter in question transpired. The district attorney did not ask the witness Dukes the question attributed to him in the bill of exceptions, and Dukes did not answer it over the objection of the defendant's counsel as stated in the bill. The statement of Jones to Dukes was brought out by the defendant himself as is shown by the statement of facts on page 10 (near the bottom of page) and notwithstanding the fact that defendant, through his counsel, drew out of Dukes and in that way put into the record what Jones had said to him, as soon as he had done so, I excluded what Jones had said." By reference to the statement of facts we find that the court is correct in his qualification, and that the State did not adduce this testimony, but it was introduced by defendant on cross-examination, and without objection being made, the court at once excluded it as hearsay, and instructed the jury not to consider it.

There was no exception reserved to the action of the court in overruling the motion for continuance, consequently we can not review that ground in the motion for new trial.

In the motion for a new trial it is alleged that the court erred in overruling the motion to quash the indictment. There is no such motion in the record; however, we have read the indictment and it is drawn in terms frequently approved by this court.

The special charges requested by appellant, insofar as they are the law, were fully presented to the jury by the court in his charge. The only other two questions in the record are that the evidence is insufficient to sustain the conviction of a felony, and the court erred in not submitting the question of misdemeanor embezzlement. In this case it is clearly shown that Mr. Dukes sent appellant a check for $163.50 with which to pay an amount due the State, and secure for him a patent to his land; that appellant received the money on January 5th, and on that date appellant deposited to his credit this check in the State Bank at Sipe Springs. At the time he deposited this check he was overdrawn at this bank in the sum of $16.37; that on January 6th appellant gave a check or checks for $8.50, and on January 9th the bank cashed a check or checks of appellant for $141.98, these items aggregating $166.85,—thus, on January 9th, appellant had again overdrawn for $3.35. It is thus seen that appellant had appropriated all of this money to his own use within three days after he received it, and had not sent the money to the Land Commissioner to obtain the patent for Mr. Dukes' land. Appellant introduced a number of checks, covering a period of time from December 26, 1911, to February 8, 1912, but none of these checks would be material as to showing whether or not the court should have submitted embezzlement under fifty dollars, other than those paid on January 9th, the date the cashier of the State Bank says appellant drew out all the remainder of the $163.50. The cashier says on

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January 9th he cashed a check or checks of appellant for $141.98; that these checks were turned over to appellant, and the only checks introduced in evidence that were cashed on that day were: One for $18.70; one for $3.25 and one for $14.03, and one for $1.00, all aggregating $26.98. Take this from the $141.98, and it still leaves one hundred and fifteen dollars, which appellant appropriated to his own use on January 9th, in one lump sum. Under such circumstances the court did not err in refusing to charge on embezzlement of a sum less than $50.00 and the evidence amply supports the verdict.

Affirmed.

Affirmed.

[Rehearing denied April 16, 1913.—Reporter.]

Fred Simmons v. State.

No. 2119. Decided March 19, 1913.

1.—Murder—Evidence.

Where testimony which was first ruled out by the court was afterwards admitted on behalf of defendant, there was no error.

2.—Same—Charge of Court—Murder.

Where the evidence raised the issue of murder in both degrees, it was proper for the court to charge thereon in the proper form. Following Barton v. State, 53 Texas Crim. Rep., 443, and other cases.

3.—Same—Charge of Court—Manslaughter—Words and Phrases.

Where, upon trial of murder, the evidence showed that the killing occurred after the first meeting, but the court, nevertheless, charged on manslaughter and adequate cause, the defendant had no ground to complain, and the contention that the charge of the court used the words, "sudden passion," is without merit.

4.—Same—Charge of Court—Requested Charges—Self-defense.

Where, upon trial of murder the court properly charged on self-defense as made by the evidence, there was no error in refusing requested charges on the same subject.

Appeal from the Criminal District Court of Dallas. Tried below before the Hon. Robt. B. Seay.

Appeal from a conviction of murder in the second degree; penalty, fifty years imprisonment in the penitentiary.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, Judge.—Appellant was convicted of murder in the second degree and his punishment assessed at fifty years confinement in the State penitentiary.

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It appears that appellant's wife had left him and gone to live with her aunt, Josephine Fuller, with the murder of whom appellant is charged in this case. On the afternoon of the homicide, appellant went to the house where his wife was staying with her aunt. The State's testimony is that appellant, at this time, mistreated his wife, and was forced to leave by deceased, Josephine Fuller. Appellant contends that he went to see his wife at her request, and she desired to go with him, but deceased would not permit her to do so, and forced him to leave, saying if he did not do so, she would kill him, at the same time drawing a pistol on him. It is manifest that appellant left the place where his wife and deceased were residing, the issue of whether or not he had mistreated his wife being a contested issue. After leaving the house and being gone some time, he returned, and the fatal encounter ensued in which appellant killed his wife, Josephine Fuller and her husband Curtis Fuller; also shooting another woman in the chin. The State's theory is that when appellant returned to the house he asked for Josephine Fuller, and when her husband came to the door he shot and killed him, rushed in the house and killed Josephine Fuller and his wife, in the melee shooting Sallie McCall in the chin, saying at the time he intended to kill all of them.

Defendant's theory is that he returned to the house to get his wife, and when he asked for her, Curtis Fuller appeared at the door, armed, and some one saying "kill him," he thought he was in danger of losing his life and he shot and killed Curtis; that he then went in the house and, Josephine being armed and attempting to kill him, he shot and killed her; that the killing of his wife and the shooting of Sallie McCall was accidental and unintentional.

In the first bill of exception appellant complains of the action of the court in overruling his application for a continuance. In approving the bill, the court shows that all the witnesses for whom process had been issued, were in attendance during the trial of the case, some of them being examined by appellant without placing them on the stand. As to the witnesses for whom no process had been issued, the diligence shown is insufficient. None of the witnesses for whom appellant sought a continuance witnessed the killing, but were in the main character witnesses, and under such circumstances the court did not err in overruling the application for a continuance.

In the other three bills in the record it is complained that the court erred in rejecting certain testimony. The court, in approving the bills, states that when the testimony was first offered, he did sustain an objection to it, but after appellant testified, the witnesses were again offered, when the objection was overruled, and the witnesses were permitted to testify in detail. As the testimony was admitted during the trial of the case, no error is presented.

The court did not err in submitting murder in the first degree. The evidence on behalf of the State raised that issue, and the court's

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charge on murder in the second degree has been frequently approved by this court (Barton v. State, 53 Texas Crim. Rep., 443; McGrath v. The State, 35 Texas Crim. Rep., 413 and cases cited in Sec. 426 Branch's Crim. Law.)

The court's charge on "adequate cause" was a direct application of the law to the testimony offered in behalf of appellant on that issue, and the court in so specifically applying the law to the evidence in the case, should be commended, and not condemned. The complaint that the charge was error in instructing the jury that if adequate cause existed and this produced "sudden passion" is without merit. The killing did not take place at the first meeting after appellant says he was informed that deceased was the cause of his wife leading a life of shame. He admits he saw deceased the first time he visited the house; that his wife had written him prior to that time, and he was made aware of no new facts after this first meeting. The other criticisms of the charge on manslaughter are also without merit.

The charge on self-defense is also a full and fair presentation of that issue as made by the evidence, and the charge as given, covering the law of the case, it was not necessary to give the special charges, or either of them, requested by appellant.

The judgment is affirmed.

Affirmed.

OLIVER CORLEY V. STATE.

No. 2011. Decided March 19, 1913.

1.—Aggravated Assault—Continuance—Mutual Combat.

Where it was a serious question whether defendant invited the injured party out of the house or whether he acted in self-defense, he should have been permitted to procure the witnesses who were present at the difficulty.

2.—Same—Charge of Court—Self-defense—Force.

Where, under the evidence, the issue of mutual combat and self-defense were presented, defendant's right of self-defense should not have been abridged by a charge on excessive force, as the evidence did not raise this issue.

3.—Same—Evidence—Bloody Clothing.

Where the location of the wound was not disputed and that the defendant did the cutting, the court should not have permitted in evidence, the bloody coat which the injured party wore at the time he was cut and permit prosecuting counsel to comment thereon.

Appeal from the County Court of Scurry. Tried below before the Hon. Fritz R. Smith.

Appeal from a conviction of aggravated assault; penalty, a fine of $40.

The opinion states the case.

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Higgins, Hamilton & Taylor, for appellant. On question of the court's charge: Rea v. State, 80 S. W. Rep., 1003; Wenzel v. State, 48 Texas Crim. Rep. E. 25, 90 S. W. Rep., 28; Harris v. State, 36 S. W. Rep., 263; Aycock v. State, 61 Texas Crim. Rep. 9, 133 S. W. Rep., 683; Marsden v. State, 53 Texas Crim. Rep. 458, 110 S. W. Rep., 897.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant prosecuted and convicted of an aggravated assault and his punishment assessed at a fine of forty dollars.

In view of the disposition of the case, we do not deem it necessary to pass on the question of the action of the court in overruling the application for continuance. However, we will state that as the witnesses named were present at the difficulty, and it was a serious question in the case whether or not appellant invited the injured party out of the house, we are of the opinion the continuance ought to have been granted. If appellant invited Charley Creighton out of the store to engage in a fight, the difficulty would come under the rules of law applicable to mutual combat, and self-defense would not be presented. If, however, as contended by him, when Creighton knocked defendant's hat off, he pulled his knife, and at the request of the proprietor of the store, he walked out of the store, and was followed by Creighton, then his right of self-defense would not be abridged.

The court, in his charge on self-defense, instructed the jury that if appellant used more force than was necessary in defending himself, he would not be justified in cutting deceased. This was duly excepted to and a special charge presented, the failure to give same being also excepted to. The issue of excessive force was not presented by the evidence, and the court erred in charging thereon. Under the evidence the issue of mutual combat was presented, and if the jury believed the State's theory, the only question would be whether or not appellant was guilty of an aggravated or simple assault. The appellant denied inviting Creighton out of the house, but said, when he started out of the house, he was followed by Creighton, who attacked him. If this is true, his right of self-defense should not be abridged or limited by any charge on excessive force, for there is no evidence raising this issue.

Again, the court permitted Creighton's bloody coat to be introduced in evidence. That appellant cut Creighton was not a disputed issue; the location of the wound was not questioned, and the clothing would serve no useful purpose in illustrating any issue in the case, and the court erred in admitting the coat in evidence. This error was further emphasized by the private prosecutor in his closing address, pulling off his own coat and putting on the coat with holes in it, wearing it while addressing the jury. If on another trial the evidence for

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the State is the same as on this trial, and the admission is made by appellant that he made on this trial, the coat should not be admitted.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

JIM VICKERS V. STATE.

No. 2097. Decided December 11, 1912.

Rehearing denied March 19, 1913.

1.—Incest—Accomplice—Corroboration.

Where, upon trial of incest, the State established its case by the testimony of the prosecutrix, which was corroborated by the fact that the defendant made an effort to produce an abortion on prosecutrix and also attempted to commit suicide, etc., the corroboration of the accomplice testimony was sufficient.

2.—Same—Evidence—Husband and Wife.

Where, upon trial of incest, the State was permitted to introduce the former wife of defendant to prove by her that during their marriage and at the time of the alleged offense, she was pregnant, to convey the idea that defendant would not probably have sexual intercourse with her at that time, but would be more likely to have such intercourse with his step-daughter, the same was reversible error. Articles 774 and 775, Code Criminal Procedure. Distinguishing Cole v. State, 51 Texas Crim. Rep., 89; Richards v. State, 55 id., 278.

3.—Same—Former Marriage—Bastard—Presumption.

Where, upon trial of incest, it appeared that defendant had been married prior to his marriage to the mother of prosecuting witness and there was no evidence that the former wife was dead or the marriage had been legally dissolved, the conviction could not be sustained. The fact that defendant had a son when he married the second time, would not raise the presumption that the latter was a bastard. Following McGrew v. State, 13 Texas Crim. App., 340.

4.—Same—Evidence—Opinion of Witness.

The opinion of a witness that someone else than defendant might be the father of the child of the prosecuting witness was inadmissible.

5.—Same—Argument of Counsel—Allusion to Defendant's Failure to Testify.

Upon trial of incest, where State's counsel called attention to the fact that no one was present when the alleged act of intercourse occurred than the defendant and prosecuting witness, and further stated that the act did take place and that no one denied it, this was an allusion to defendant's failure to testify, and was reversible error.

Appeal from the District Court of Williamson. Tried below before the Hon. C. A. Wilcox.

Appeal from a conviction of incest; penalty, five years imprisonment in the penitentiary.

The opinion states the case.

J. F. Taulbee and *Richard Critz,* for appellant. On question of corroboration: State v. Willis, 9 Iowa, 582; Gillian v. State, 3 Texas Crim. App., 132.

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C. E. Lane, Assistant Attorney-General, and *Jas. R. Hamilton,* District Attorney, and *Nunn & Love,* for the State. On question of testimony of former wife: Ex Parte Fatheree, 31 S. W. Rep., 403, and other cases; Nance v. State, 17 Texas Crim. App., 385.

On question of argument of counsel and allusion to defendant's failure to testify: Lancaster v. State, 36 Texas Crim. Rep., 16; Smith v. State, 55 Texas Crim. Rep., 563, 117 S. W. Rep., 966; Lochlin v. State, 75 S. W. Rep., 305; Bruce v. State, 53 S. W. Rep., 867; Wilkerson v. State, 57 S. W. Rep., 956; Davis v. State, 44 S. W. Rep., 1099; Wingo v. State, 75 S. W. Rep., 29; Jones v. State, 50 Texas Crim. Rep. 329, 96 S. W. Rep., 930.

HARPER, JUDGE.—Appellant was prosecuted and convicted of the offense of having carnal knowledge of his stepdaughter, Miss Ollie Walston, and his punishment assessed at five years confinement in the penitentiary.

Appellant earnestly insists that the testimony of the prosecuting witness is not sufficiently corroborated to sustain the conviction. We have carefully reviewed the testimony. Her testimony makes a clear case, and we are of the opinion that the testimony of Dr. Stone, who says he sold the appellant the medicine which the prosecuting witness says appellant delivered to her to produce an abortion and miscarriage, the fact that he attempted to commit suicide, as he said he told her he would if she told about the matter, and the conversation testified to by the witness, Arthur Walston, would support the verdict, although it would be more satisfactory if the testimony would show that in fact the medicine sold by Dr. Stone to appellant and by him delivered to prosecuting witness, was in fact calculated to produce a miscarriage. However, we do not think the testimony of Mrs. Ella Vickers, the wife of appellant, ought to have been admitted in evidence. It is true that at the time she testified she had been divorced, but the matter in regard to which she testified took place while she was the wife of appellant. It is also true that the matters in regard to which she testified on direct examination might be said to be collateral matters, but the defendant's theory was, that there was a collusion between Mrs. Vickers and her two children to run appellant off, and the defendant proved that subsequent to the separation Mrs. Vickers had deeded Arthur Walston certain lands, and intended to deed the prosecuting witness certain lands. This was introduced to affect their credit as witnesses. The testimony of Mrs. Vickers would show there was no such agreement, and the land, although in appellant's name and purchased after his marriage, was in fact paid for with funds belonging to the community estate of her first marriage, and therefore it was proper for her to make the deeds. This testimony was introduced to strengthen the testimony of the two main witnesses for the State, and is it permissible to prove by the wife facts which will support the witnesses against her husband? Article 775 of the

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Code of Criminal Procedure provides: "The husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other, except in a criminal prosecution for an offense committed by one against the other." And Article 774 provides that this inhibition continues after the marriage relation ceases as to matters taking place during the married relation. In Sec. 983 of White's Ann. Code of Crim. Proc. will be found a long list of authorities, which hold that Mrs. Vickers should not have been permitted to testify in this case. The State had an object and purpose in introducing her as a witness, and we can not now be permitted to say that her testimony was immaterial, and therefore no ground for reversal. In fact, the purpose is plainly manifest, which was to strengthen the testimony of Ollie and Arthur Walston, and on these two witnesses the State must rely for a conviction.

Again, it appears that appellant had been married prior to his marriage to the mother of the prosecuting witness, the present Mrs. Vickers. There is no evidence that the former Mrs. Vickers was dead or appellant had secured a divorce from her. Where it affirmatively appears that the defendant had been married prior to the marriage to the mother of the prosecuting witness in an incest case, it should also affirmatively appear that the first marriage had been legally dissolved by death or otherwise. (McGrew v. State, 13 Texas Crim. App., 340.)

There was no error in excluding what Arthur Walston told defendant about another might be the father of the child of the prosecuting witness. What Arthur Walston's opinion may have been in the premises would not be legitimate testimony. Neither do the other bills in regard to admitting testimony present any error.

In bill No. 5 it is shown that W. H. Nunn in addressing the jury said: "They tell you the prosecuting witness has not been corroborated—they will tell you no one saw the act of intercourse except the two (prosecutrix and defendant). 'Tis true that no one was present at the act of intercourse but these two; 'tis true that Ollie Walston testifies that no one was present when the defendant told her to take the turpentine except herself and the defendant, but gentlemen, she has testified to both of these transactions, and they have not dared to put a witness on the stand to contradict her testimony in any particular." These remarks were excepted to, and if they do not challenge the attention of the jury to the fact that defendant had not testified, we are unable to understand the English language. Prosecuting officers should not thus seek to indirectly call the attention of the jury to the fact that a defendant has not testified in the case. This is a right given in law, but he is not bound to avail himself of that privilege, and if he is willing to rest his case on the weakness of the State's case he has a right to do so.

The court did not err in refusing to quash the indictment. The indictment is drawn in terms frequently approved by this court.

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There are many assignments in the motion for new trial, and we have carefully reviewed each, and none of the others present error, but on account of the errors above pointed out, the judgment is reversed and the cause is remanded.

Reversed and remanded.

ON REHEARING.

March 19, 1913.

HARPER, JUDGE.—The State has filed a motion for rehearing in this cause, and first insists that we erred in holding that the testimony of Mrs. Vickers was inadmissible, and cites us to the cases of Cole v. The State, 51 Texas Crim. Rep., 89, 101 S. W. Rep., 218; Richards v. The State, 55 Texas Crim. Rep., 278, 116 S. W. Rep., 587, and in those cases it may be said that in construing the statutes relating to the wife testifying against her husband, it is apparently held that after the marriage relation ceases, the divorced wife may testify to anything that took place while the marriage relation existed, except such matters as were of a confidential nature.

Article 795, Revised Code Criminal Procedure reads: "The husband and wife may, in all criminal actions, be witnesses for each other; but they shall, in no case, testify against each other, except in a criminal prosecution for an offense committed by one against the other."

This court has strictly construed this statute, and held that while the marriage relation *continues to exist* the State can not call the wife as a witness in any case, except where he is being prosecuted for an offense against her, and in the case of Compton v. The State, 13 Texas Crim. App., 271, Judge White in a well considered opinion, held that under this provision of the Code the wife was not a competent witness in the prosecution for incest against her husband, and this opinion has been adhered to by this court since its rendition. In that case the wife had not been divorced, and counsel may well contend that it does not apply, as Mrs. Vickers had been divorced at the time she was offered as a witnesss in this case, and this brings her under the law as announced in Article 794, Revised Code Criminal Procedure, which reads: "Neither husband nor wife shall, in any case, testify to communications made by one to the other, while married; nor shall they, after the marriage relation ceases, be made witnesses as to any such communication made while the marriage relation subsisted, except in a case where one or the other is prosecuted for an offense; and a declaration or communication made by the wife to the husband, or by the husband to the wife, goes to extenuate or justify an offense for which either is on trial." In construing this article of the Code in the Cole case and Richards case, supra, this court seems to have held that after the marriage relation has ceased to exist it is the "confidential communications" which are inhibited

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by the statute, and that the wife, after divorce, may testify to anything that occurred while the marriage relation existed, not of a confidential nature, it being specially so decided by Presiding Judge Davidson in the Richards case, hereinbefore referred to, and which opinion we have recently followed and adhered to.

In this case Mrs. Vickers testified: "My name is Ella Vickers; I live out on the San Gabriel River—on the North Gabriel, on the old Vickers place. My maiden name was Milligan. I have been married twice. W. R. Walston was my first husband. He died in Burnet County, about a mile and a half from Fairland. He died in 1898, I believe. He left an estate; he left a farm up there. We sold the farm and divided it with the heirs; let the heirs have their part, and then we took what was left and put part of it in the old Vickers place, the one we now live on. There were some legal proceedings had for the purpose of selling this property; the court sold the property. The first payment on the Vickers place came out of a land note from the other place. When I married the second time I was married in North Georgetown, at Cobb's residence. Jim Vickers was my second husband; that man there (points to defendant). Ollie Walston is my daughter by my first husband. My youngest child was thirteen months old yesterday. Ollie Walston has a child; her child was eight months old the 13th of this month. As to my condition during the month of January, 1911, as to being pregnant or not,—I will say that I was getting kinder helpless. What I mean by that is that I was pregnant; I was in what is known as a family way." In the original opinion we may have stated the law too broadly to make it clear that we did not intend to overrule nor limit in any degree the rule announced in the Richards and Cole cases, and authorities therein cited. If the language in the original opinion can be so construed, it is withdrawn. However, we are still of the opinion that all this testimony was not admissible, and in so holding we do not think it in anywise conflicts with those cases. Appellant was being prosecuted for having had carnal intercourse with his stepdaughter in January, 1911, and we do not think it was permissible to show by the wife that she at that time was pregnant. What was or could be the purpose in eliciting this testimony? Only to show that appellant's wife was in such condition he could not and probably would not have sexual intercourse with her at this time, and therefore would the more likely be guilty of having sexual intercourse with some other woman,—his stepdaughter. This, we think, is permitting the State to invade too far the privacy of the marriage relation existing between the husband and wife,—to prove such facts by either as evidence against the other. As to the details of the land transaction, in this we may be in error, and this is the part of the original opinion withdrawn.

The State again insists that we were in error in holding that as the record showed that appellant had a son prior to his marriage to the prosecuting witness' mother, that it also ought to have been proven

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that his former wife was dead and he had been divorced from her. The McGrew case cited in the original opinion so announces the law, and we have found no decision holding otherwise. The case cited by the State, Nance v. The State, 17 Texas Crim. Apps., 385, merely holds that proof of the fact that a woman had a daughter at the time she married Nance, was no evidence that she had ever been married. But is this also true of a man? Can he legally have a son without having been married? The law recognizes the child of a woman before marriage as her child, but not so as to a man. Such child could not inherit from the man, but could from the mother. While some may cavil as to this distinction in law, and think it should be changed, but so long as it is the law, it must be respected and obeyed.

The other contention, that we erred in holding that it was error for the prosecuting officers to refer to defendant's failure to deny that he had sexual intercourse with his stepdaughter, after careful and thoughtful study of the record, and the law applicable thereto, we are more thoroughly convinced, if anything, that this was such error, as it alone ought to result in a reversal of the case. In this case the State's counsel called attention to the fact that no one was present when the act of intercourse took place (if it did take place) other than the prosecuting witness and appellant; that the prosecuting witness swore positively that it did take place, and appellant did not deny it. Language could not be used that would more forcibly impress that fact on the jury's mind, and it apparently was done to aid in securing a conviction of defendant. The corroboration of the prosecuting witness was perhaps sufficient to sustain the conviction, if fairly obtained, but it is not of that cogent force that a jury would not have been justified in finding otherwise. And under such circumstances the State can not be permitted to obtain a conviction by illegitimate and questionable methods.

The motion for rehearing is overruled.

Overruled.

PERO GRASO V. STATE.

No. 2365. Decided March 19, 1913.

Carrying Pistol—Date of Offense.

Where, upon trial of unlawfully carrying a pistol, the evidence failed to show that the offense had been committed before the making of the complaint and information and filing thereof, the conviction could not be sustained.

Appeal from the County Court of Dallas County at Law. Tried below before the Hon. W. F. Whitehurst.

Appeal from a conviction of unlawfully carrying a pistol; penalty, a fine of $100.

The opinion states the case.

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W. L. Mathis, for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was convicted of unlawfully carrying on and about his person knuckles made of some character of metal.

The complaint and information were filed on the 25th day of November, 1912, charging that on 23rd of November appellant carried the said knuckles about his person. The information was filed the same day of the complaint. The evidence for the State, through the witness Miller, is that on the 27th day of November, 1912, he was deputy constable of precinct No. 1, in Dallas County, and on the night of said day he and two officers were standing on the corner of Jackson and Houston Streets in the City of Dallas, where he arrested the defendant. While standing on said corner, he saw the defendant in company with other Mexicans coming down the sidewalk; that when they approached the corner where he was standing he stopped the defendant and arrested him. Then follows what occurred between them at the time he arrested defendant, and at the time he arrested him he searched and found on him the knuckles charged in the information.

Without discussing any other feature of this case this conviction can not be sustained. On the 25th of November appellant was charged with having knucks on his person on the 23rd day of November, two days prior to the complaint and information. The facts show the witness Miller took the knucks from him on the 27th of November, two days after the complaint and information were filed. The evidence must show that the offense had been committed before the making of the complaint and information. The complaint can not charge an offense to be committed in the future.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

FRANK D. EASON V. STATE.

No. 2368. Decided March 19, 1913.

Local Option—Information—Complaint.

Where the complainant swore positively to a sale instead of his belief, and the information and complaint did not negative the fact that a sale was not made on a prescription, etc., the same were, nevertheless, sufficient.

Appeal from the County Court of Gonzales. Tried below before the Hon. W. B. Green.

Appeal from a conviction of a violation of the local option law; penalty, a fine of $25 and twenty days confinement in the county jail.

The opinion states the case.

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No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.—On question of sufficiency of complaint and information: Slack v. State, 61 Texas Crim. Rep., 372.

HARPER, JUDGE.—Appellant was convicted of the offense of selling intoxicating liquors in prohibition territory and his punishment assessed at a fine of $25 and twenty days confinement in jail.

There are no bills of exception and no statement of facts accompanying the record. However, appellant moved to quash the complaint and information on two grounds, and these should be considered: First, because complainant swears positively to a sale, instead of alleging "that he has reason to believe and does believe." This presents no ground to quash, and neither does the second, that the complaint and information does not negative the fact that a sale was not made on prescription, etc.

The judgment is affirmed.

Affirmed.

FRANCISCO GAMBOA V. STATE.

No. 2373. Decided March 26, 1913.

1.—Fraudulent Conversion—Reproduction of Testimony—Impeachment.

In the absence of a proper predicate, it was error to reproduce the testimony of an absent witness; besides, the testimony was not of an impeaching character and should not have been admitted for that purpose.

2.—Same—Evidence—Rebuttal.

Where, upon trial of fraudulent conversion of a horse, the defendant sought to meet the testimony of the alleged owner that he had inquired about his horse by showing that he had not made such inquiry, he should have been permitted to do so.

Appeal from the District Court of Hidalgo. Tried below before the Hon. W. B. Hopkins.

Appeal from a conviction of fraudulent conversion of a horse; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was convicted for the fraudulent conversion of a horse obtained by him under a contract of borrowing as alleged in the indictment.

The State's contention is that appellant borrowed the horse from Villareal, and under an understanding with Villareal that he was to use the horse for three or four days, or a few days. It is further

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shown by the State that appellant had had the horse several months when he sold him. Appellant's theory is that he purchased the horse from Villareal, paying him $35 as a consideration. After the sale of the horse appellant was arrested charged with theft by conversion. Without going into the bills of exception seriatim, they present two leading questions: First, that the State was permitted to reproduce testimony of a witness named Vasquez without laying the predicate for reproducing the testimony by showing he was dead or absent from the State; second, appellant was refused testimony intended to meet the testimony of Villareal to the effect that he, Villareal, inquired about his horse only to ascertain where it was, either or both.

In regard to the first proposition, the State contends that the testimony of Vasquez was introduced for the purpose of impeaching the defendant who testified in his own behalf. Appellant did testify, and among other things, stated that at the time he bought the horse from Villareal the absent witness Vasquez was present and knew of the trade. On the examining trial Vasquez testified and used about this language, that he knew nothing about the case. The testimony consists of but a few lines, and details of the transaction were not gone into, and in fact he seems not to have been asked in regard to the sale. His testimony, as before stated, is that he knew nothing about the case. This testimony did not impeach the defendant. If Vasquez had been there and testified as he did in the examining trial that he knew nothing about the case, and would have further testified that he did not know of the sale, was not present, nor saw the sale, it would have been but contradictory of the defendant's testimony, and not an impeachment of defendant's testimony. Again, it was not permissible to use the absent witness' testimony unless a proper predicate had been laid and the witness shown to have been dead or beyond the jurisdiction of the court. The State did not lay the predicate in any way or undertake to do so in order to reproduce the testimony of the witness.

In regard to the second proposition, we are of opinion that appellant was entitled to show, as he offered to do by the sheriff, if not others, that Villareal did not inquire of them in regard to defendant or his horse, or ask the sheriff to investigate the matter and find the defendant. The sheriff would be naturally the man of all others, he being the sheriff, to whom Villareal should have gone to ascertain the location of his horses and the defendant, and the arrest of defendant if in fact he converted the horses. This would seem to be made stronger by reason of the fact that it had been several months after appellant had obtained possession of the horses before appellant sold it or he was sought or arrested. Villareal's discovery came very suddenly after he had sold the horse, only being a very short time, a few days at most. Villareal testified he had made such inquiries.

For these reasons this judgment is reversed and the cause remanded.

Reversed and remanded.

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ED RIVERS V. STATE.

No. 2372. Decided March 26, 1913.

1.—Carrying Pistol—Statement of Facts—Charge of Court.

In the absence of a statement of facts, an objection to the charge of the court cannot be reviewed; besides, the charge requested by defendant was substantially given in the court's main charge.

2.—Same—Sufficiency of the Evidence—Practice on Appeal.

An objection that the evidence is insufficient to sustain the conviction cannot be revised on appeal, in the absence of a statement of facts.

Appeal from the County Court of Dallas County at Law. Tried below before the Hon. W. F. Whitehurst.

Appeal from a conviction of unlawfully carrying a pistol; penalty, thirty days confinement in the county jail.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—This appeal is prosecuted from a conviction for carrying on and about the person a pistol.

The record is before us without a statement of facts or bills of exception. Appellant asked the following instruction: "You are further instructed that if you find and believe from the evidence that the defendant on the day charged redeemed his pistol at a pawn shop in the City of Dallas for the purpose of carrying it to his home or in case you have a reasonable doubt as to this you will acquit him." This was refused by the court. We might pass this with the statement, the evidence not being before us, that we are unable to ascertain whether the charge was applicable to the facts or not, but we suppose that inasmuch as the court gave a similar charge, the facts did suggest the issue. The court gave this instruction to the jury in this connection: "You are further instructed that if you find and believe from the evidence that the defendant on that date took said pistol out of the pawn shop and was taking said pistol directly to his home or if you have a reasonable doubt there, then you will acquit the defendant." This is substantially the charge requested by appellant, the difference being the court confined the jury to taking the pistol directly to his home, whereas that phase of the evidence, if raised, was not included in appellant's refused instruction. In any event, the facts not being before us, we are unable to revise the matter intelligently, and for this reason the judgment will not be reversed.

The motion for new trial, in addition to the refusal of the court to give the requested instruction, also suggests the evidence is insufficient. This can not be revised in the absence of the statement of facts. As the record is presented, the judgment will be affirmed.

Affirmed.

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MORRIS CLYMAN V. STATE.

No. 2371. Decided March 26, 1913.

1.—Disorderly House—Evidence.

Upon trial of keeping a disorderly house for the purpose of prostitution, there was no error in admitting testimony that the witness was a prostitute and plied her vocation in said house stating the attendant circumstances.

2.—Same—Charge of Court—City Ordinance.

Upon trial of keeping a disorderly house for purposes of prostitution, there was no error in the court's charge that a city was not authorized to set apart and designate any part of said city for the purpose of permitting prostitution.

3.—Same—Charge of Court—Separate Offenses.

In prosecutions for keeping a disorderly house for purposes of prostitution, where the State alleged separate offenses in different counts, there was no error in the court's charge instructing the jury to return a verdict upon each count in the indictment.

4.—Same—Charge of Court—Requested Charges.

Where the requested charges, which were applicable were substantially contained in the court's main charge, there was no error in refusing them.

Appeal from the County Court of Dallas County at Law. Tried below before the Hon. W. F. Whitehurst.

Appeal from a conviction of keeping a disorderly house for purposes of prostitution; penalty, a fine of $200 and twenty days confinement in the county jail.

The opinion states the case.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—The indictment in this case contains three counts and charges that appellant, on the 8th, 10th and 12th days of July, 1912, was the owner, lessee and person in control of a certain house situate in Dallas County, and did unlawfully and knowingly permit said house to be used for the purpose of prostitution, and as a house where prostitutes were then and there permitted to resort and reside for the purpose of plying their vocation. He was convicted on all three counts.

Dorothy Ross was permitted to testify that she rented rooms in this house from appellant and paid him $1.50 per day as rent; that she was a prostitute and plied her vocation in this house. The court did not err in permitting her to so testify, and the circumstances are such that they authorized the jury to find that appellant had full knowledge of the facts when he rented the house and daily collected the rent.

The court, under the evidence adduced in this case, correctly instructed the jury that the City of Dallas was not authorized to set

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apart and designate any part of said city for the purpose of permitting prostitutes to resort and reside therein for the purpose of plying their vocation,—to do so would be in violation of the laws of the State. Neither was it error for the court to instruct the jury to return a verdict upon each count in the indictment. In this character of case, the State can allege the offense to have been committed on each of several days in different counts, and sustain a conviction upon each count if the evidence justified such verdict.

The court's charge having fully covered all the law applicable to the case it was not necessary to give any of the special charges requested. The one which sought to have the court instruct the jury that if the premises were situate in what is known as the "reservation," and same had been set apart by the City of Dallas, for the segregation of prostitutes is not the law and should not have been given. This would violate a State law and the City of Dallas could not pass an ordinance in contravention thereof.

The judgment is affirmed.

Affirmed.

CHAS. MATTHEWS V. STATE.

No. 2370. Decided March 26, 1913.

1.—Theft of Hog—Insufficiency of the Evidence.

See opinion for facts held to be insufficient to sustain a conviction for theft of a hog.

2.—Same—Charge of Court—Defensive Theory.

Where, upon trial of theft of a hog, the evidence showed that defendant claimed to have purchased the hogs, the meat of which was found in his possession, etc., the court should have submitted his defensive theories of the case.

3.—Same—Charge of Court—Circumstantial Evidence.

Where, upon trial of theft of a hog, the evidence was circumstantial, the court should have submitted a proper charge thereon.

4.—Same—Remarks by Judge—Comment on Testimony.

Upon trial of theft of a hog, it was error on part of the trial judge to make certain remarks on the condition of the witness and the character of his testimony with reference to finding tracks, etc., as the same was a direct comment on the testimony and in violation of the statute.

Appeal from the District Court of Wharton. Tried below before the Hon. W. C. Carpenter, special judge.

Appeal from a conviction of theft of a hog; penalty, three years imprisonment in the penitentiary.

The opinion states the case.

Linn, Conger & Austin and *W. S. Hall*, for appellant.—On question of court's failure to submit theory of defense: Coggins v. State, 151 S. W. Rep., 312; Wheeler v. State, 34 Texas Crim. Rep., 350;

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Bailey v. State, 50 id., 398; Bond v. State, 23 Texas Crim. App., 180; Smith v. State, 24 id., 290.

On question of charge on circumstantial evidence: Wheeler v. State, 61 Texas Crim. Rep., 27; Trevino v. State, 38 id., 64; Brown v. State, 61 id., 334; Yarbrough v. State, 151 S. W. Rep., 545.

On question of remarks by court: Moore v. State, 33 Texas Crim. Rep., 306; Kirk v. State, 35 id., 224.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, Presiding Judge.—Appellant was convicted of hog theft. The State's theory was that appellant committed theft of the hogs from Peter Tharp. Peter Tharp testified he was the owner of several hogs, three of which he missed on Thursday; that he tracked three hogs from near his place to the premises of another man and within 150 yards or such matter from appellant's residence or premises. He introduced testimony of another witness or two who also followed the tracks of the hogs. One witness testified that he knew and could identify one of the tracks as those made by one of Tharp's hogs. He had seen the hogs several times, perhaps quite a number of times, but he could identify that particular track as the one made by a particular hog, although there was no peculiarity about the track, but he just knew that that was the track of one of the missing hogs. The witnesses who followed the tracks of the hogs stated that there were no tracks of human beings following the hogs, or anywhere in proximity of the tracks of the three hogs they followed, nor were there any horse tracks following the hogs. They testified that the hog tracks were plain, but that there was no evidence that anybody had followed or driven the hogs so far as indications on the ground were concerned. They differ considerably about the details of the matter in regard to following the tracks. One witness says the hogs rooted along the trail where they went, turning to the right and left and rooting here and there, and others said they did not. It is not intended here to go into a detailed statement of these matters. There was a search warrant obtained, and an officer went to appellant's house and examined his smokehouse. In it they found the meat or part of the meat of three hogs. There is a difference of testimony among the State's witnesses in regard to the discovery there. For instance, the officer says he carried all the meat away and among other things the head of one hog. Another witness says they carried the head of three hogs away. The witnesses for the State testify that the meat found in appellant's smokehouse would correspond fairly well with the size of the hogs that belonged to Tharp. Appellant denies having had anything to do with Tharp's hogs; he shows that he was absent that day making a purchase of hogs some miles distant, and that he brought these hogs home in a wagon, and killed three of them. That he bought hogs was abundantly proven by quite a number of witnesses. That he killed

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three hogs, the meat of which was found in appellant's smokehouse, is proved by witnesses who assisted him in the killing, as well as by his own testimony, and that those hogs he killed were about the same grade and character of hogs. He bought eleven hogs for which he paid $45. He proved by one of his neighbors, from whom he borrowed a pair of mules to work to the wagon in connection with defendant's two mules, which he hitched to the wagon and went after the hogs, that he bought and brought them home. This seems not to have been controverted and was abundantly shown. The vendor of the hogs testified in the case as did several witnesses, and knew of the transaction, as well as those who assisted in bringing the hogs home and in killing three of them, and placing the other eight in his pen, and which appellant had in his pen at the time the officers went there. In addition to this appellant proved an enviable reputation as a law-abiding honest man for twenty-five or thirty years. This was not controverted. The writer is of the opinion that the State failed to make a case, and that the defendant proved his innocence even beyond a reasonable doubt, and unless the State can do better upon another trial, this case should not be prosecuted.

The court failed to charge the jury in regard to appellant's defensive matters, which have been mentioned. This was raised in various ways by appellant, and is presented for reversal. The jury should have been instructed fully and fairly in regard to the testimony introduced by appellant. The authorities are so numerous and harmonious on this question it is not deemed necessary to cite them.

The court's charge on circumstantial evidence is criticised. We are of the opinion the court's charge on this matter is not correct, and upon another trial a full charge on this phase of the law should be given if the case should be again tried.

There is another question reserved by bill of exceptions, which discloses that while the State's witness, Harris, was being cross-examined, the following question was asked: "What did you do with the egg-nog that you had that morning?" to which the witness answered, "I drank the egg-nog." The witness was then asked how much he drank, and he answered he drank all he had. Whereupon the court of its own motion introduced the following objection to such testimony: "It is immaterial how much egg-nog he drank; he might have been drunk but he hunted hogs, and it is immaterial how much egg-nog he drank, if he hunted them it must stand unless it be contradicted; if he said he hunted them, he could have hunted them, whether he was drunk or sober. And he could have hunted them whether he was competent or not." Appellant urged the following exceptions: First, because said remarks of the court expresses the opinion of the court on the testimony, and was hurtful and prejudicial to defendant and violative of the rule which inhibits the court from expressing its opinion of the evidence; second, because the expressed opinion was directly upon the weight of the evidence; third, because the mental and phys-

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ical condition of the witness in trailing hog tracks at least five days old was a material question touching his credibility, and the weight of his testimony as to such tracks, and the place they led from, and the place to which they were followed. This bill is approved with the qualification that the witness stated: "The egg-nog he drank on Christmas day did not hurt him. This statement was made by the witness voluntarily and not in answer to any question put to him with reference to it, during the time the court and counsel for defendant were in the colloquy stated in this bill of exceptions." This qualification of the judge does not help the matter. If the witness had drunk egg-nog enough to be affected, it might have some bearing with the jury as to his condition at the time he was following the tracks, at least it was admissible for what it was worth to go to the jury in showing the condition of the witness at the time he was following the tracks. If we were to go to the testimony of this witness in connection with all these matters, it could be shown readily this witness was not altogether in harmony with the other witnsses in regard to tracks. It certainly was error and violative of the statute on the part of the court to make the remarks in the presence and hearing of the jury, which he admits in the bill of exceptions he did make. It was a direct comment on the testimony and violative of the statutory enactment.

For the reasons indicated the judgment is reversed and the cause is remanded.

Reversed and remanded.

GEORGE CLARK V. STATE.

No. 2360. Decided March 26, 1913.

1.—Burglary—Sufficiency of the Evidence.

Where, upon trial of burglary, the evidence, although conflicting, sustained the conviction, there was no error.

2.—Same—Circumstantial Evidence—Charge of Court.

Where there was positive evidence, there was no error in the court's failure to charge on circumstantial evidence.

3.—Same—Newly Discovered Evidence—Acquittal of Codefendant—Rule Stated.

Where two are jointly indicted and one is tried and convicted and subsequently the other is tried and acquitted, a new trial will be granted the former to obtain the testimony of the latter, where it appears that the new evidence is legal and competent and material to his defense. Following Rucker v. State, 7 Texas Crim. App., 549, and other cases.

4.—Same—Case Stated—Codefendant as Witness.

Where the State's witnesses testified that defendant and his codefendant were always together when they were in possession of the alleged stolen property taken from the burglarized house and when defendant made admissions of his guilt, and said codefendant was acquitted after defendant was convicted, and it appeared in the motion for new trial that the codefendant would testify that all of these statements of the State's witnesses were false, a new trial should have been granted.

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Appeal from the District Court of Lavaca. Tried below before the Hon. M. Kennon.

Appeal from a conviction of burglary; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

Bagby & McCutchan, for appellant.

C. E. Lane, Assistant Attorney-General, and *Lester Hold* and *J. W. Ragsdale,* for the State.

HARPER, JUDGE.—Appellant was convicted of burglary and his punishment assessed at two years confinement in the State penitentiary.

While the testimony offered in behalf of the State is not very satisfactory, the State relying on the testimony of Joe Jonak and his wife to connect defendant with the offense (there being many conflicts in the testimony of these two witnesses), yet the jury solved the question in favor of the State, and the testimony of these two witnesses as to the material facts, if true, would support the verdict; therefore, we would not feel authorized to disturb the verdict on this account. And the court did not err in failing to charge on circumstantial evidence. Joe Jonak testified to seeing appellant in possession of the stolen property, and testified that appellant told him he had gotten it from the burglarized house.

The only other question raised in the record that needs to be discussed, is the one alleging newly discovered evidence which is sworn to by appellant. Jim Staha was also indicted, charged with the burglary of this house. Joe Jonak testified that on the night of the alleged burglary appellant and Jim Staha appeared at his residence in a buggy; that they had the stolen property in the buggy, and that appellant admitted they had secured it out of the burglarized premises; he also testified, that appellant and Jim Staha came to his residence the next day bringing with them the stolen property, and desired to leave it at his home, but he refused to permit it to be stored at his house. The day following the trial of appellant, Jim Staha was also placed on trial charged with this offense, and in the motion for a new trial it is shown that Staha was acquitted, and appellant claims he should be granted a new trial on the ground that "he can establish by Staha the falsity of the charge against him." In the case of Rucher v. State, 7 Texas Crim. App., 549, was said:

"There can be no doubt at this day as to the rule, or the correctness of the rule in proper cases, as now established in this State, that where two are jointly indicted, and one is tried and convicted, and subsequently the other is tried and acquitted, a new trial will be granted the former to obtain the testimony of the latter, where it appears that the new evidence is legal and competent and material

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to his defence. Lyles v. The State, 41 Texas, 172; Rich v. The State, 1 Texas Ct. App., 206; Huebner v. The State, 3 Texas Crim. App., 458; Williams v. The State, 4 Texas Crim. App., 5; Brown v. The State, 6 Texas Crim. App., 286." Many other cases might be cited following that opinion since its rendition, but we do not deem it necessary. Jonak and his wife in this case have appellant and Staha together at all times when they claim appellant was in possession of the stolen property and made the admissions of his guilt. If Staha will testify that all these statements were false, and that he was never with appellant when he was in possession of the stolen property at Jonak's home, and that appellant made no such confession as is testified to by Jonak in his presence, the testimony might have, and probably would have, produced a different result. At least, under the decisions of this court we are of the opinion that this presented sufficient ground authorizing a new trial, and the court erred in not granting it.

The judgment is reversed and the cause remanded.

Reversed and remanded.

RUBY PERRY V. STATE.

No. 2273. Decided March 26, 1913.

1.—Robbery—Bills of Exception—Filing.

Where, upon appeal from a conviction of robbery, it appeared from the record that the bills of exception were not filed within time, they were stricken out on motion of the State.

2.—Same—Statement of Facts—Practice on Appeal.

Where appellant filed a motion in the trial court asking that the original statement of facts in question and answer form as made up by the stenographer be sent up, which was overruled, and he thereupon accepted the bill of exceptions, as qualified by the court, it is too late to complain in this court, and this cannot be shown by ex parte statements.

3.—Same—Evidence—Witness—Convict—Pardon.

Upon trial of robbery, there was no error in the ruling of the court below that a conviction of a State's witness could not be proved orally, but that the judgment of conviction is the best evidence.

4.—Same—Evidence—Convict—Pardon.

Where the court permitted the defendant on cross-examination of a State's witness for purposes of impeachment to show orally that the witness was convicted and afterwards pardoned, there was no error.

5.—Same—Evidence—Judgment of Conviction—Bill of Exceptions.

In the absence of a bill of exceptions embracing the judgment and sentence of conviction, this court cannot pass on the question that such judgment was offered in evidence.

6.—Same—Evidence—Date of Offense—Limitation.

Where the indictment alleged the date of the offense on or about a certain date, there was no error in admitting testimony that the offense occurred within the period of limitation. Following Cudd v. State, 28 Texas Crim. App., 124, and other cases.

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7.—Same—Evidence—Conversation.

Where the State's witness was detailing the conversation with defendant in regard to committing the robbery, there was no error in admitting in evidence a part of the same conversation.

8.—Same—Evidence—Accomplice—Corroboration.

Where it became necessary to corroborate the accomplice testimony relating to an agreement at a certain place to commit the alleged robbery, there was no error in admitting testimony that the accomplice and the defendant were seen at that place, fixing the time by the occurrence of the said robbery.

9.—Same—Evidence—Circumstances.

Upon trial of robbery, there was no error in admitting testimony that the State's witness loaned the defendant some money and that the day after the robbery, he paid it back, and that defendant had no money prior to said date.

10.—Same—Evidence—Identification—Opinion of Witness.

Upon trial of robbery, there was no error in permitting the State's witness who was alleged to have been robbed to testify that in his opinion defendant was one of the men who committed the robbery. Following Coffman v. State, 51 Texas Crim. Rep., 478, and other cases.

11.—Same—Impeaching Own Witness—Surprise.

Upon trial of robbery, there was no error, under Article 795, Code Criminal Procedure, to permit the State who claimed surprise to show that its witness had made a different statement as to the party who committed the robbery from the one he had made on the stand.

12.—Same—Evidence—Flight.

Upon trial of robbery, there was no error in permitting the State to show that shortly after the alleged robbery search was made for the defendant and he could not be found, and that he was subsequently arrested in a distant county.

13.—Same—Bills of Exception.

Where the bills of exception were not filed within time, but this court, nevertheless, considered them that there might not be any complaint, there was no reversible error.

14.—Same—Sufficiency of the Evidence—Requested Charge.

Where the court's main charge covered the requested charges except one, which instructed the jury to acquit peremptorily, and the evidence sustained the conviction, there was no error.

15.—Same—Circumstantial Evidence—Charge of Court.

Where the evidence was positive, there was no error in the court's failure to charge on circumstantial evidence.

16.—Same—Accomplice Testimony—Charge of Court—Alibi.

Where, upon trial of robbery, the court instructed on alibi and accomplice testimony according to approved precedent, there was no error. Following Brown v. State, 57 Texas Crim. Rep., 570.

17.—Same—Practice on Appeal.

The presumption that the court below acted fairly in regard to giving bills of exception must prevail in this court, until it otherwise appears from the record.

Appeal from the Criminal District Court of Dallas. Tried below before the Hon. Robt. B. Seay.

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Appeal from a conviction of robbery; penalty, five years imprisonment in the penitentiary.

The State's testimony showed substantially that the defendant and his codefendant agreed to rob a street car, said codefendant being under age; that they met at a certain place to make this agreement, and afterwards carried it out by entering a certain street car at night and robbing the street car conductor and the motorman of the cash they had in their pockets, and that they used firearms in carrying out their purpose; that said codefendant plead guilty in the Juvenile Court and, after being pardoned, testified to said agreement with defendant and the details of the robbery, and his testimony was corroborated by various circumstances as disclosed in the opinion of the court.

No brief on file for appellant.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, Judge.—Appellant was convicted of robbery and his punishment assessed at five years confinement in the penitentiary.

The State has moved to strike the bills of exception from the record because not filed within the time permitted by law. The motion is well taken, but should we consider same, they are brought to us in a way that appellant himself complains that they do not properly present the questions. Appellant filed a motion in the trial court, asking that the original statement of facts, in question and answer form, and as made out by the stenographer, be sent up, which request was by the court refused. He alleges that he did this in order that we might turn to this record and decide whether he or the trial judge is right in certain contentions. Our decisions aptly point out appellant's remedy, if the court improperly qualifies a bill of exceptions in approving it. (Blain v. State, 34 Texas Crim. Rep., 448.) If appellant does not except to the action of the court in doing so, but accepts the bill as thus qualified, it is too late to complain in this court of the qualification. These matters must be contested in the trial court, and the record presented in a way that it in and of itself presents the erroneous ruling complained of. This can not be shown by ex parte statements in this court. We must accept the verified record sent to us, and act on the questions as thus presented.

In the first bill it is stated that the appellant objected to Oney Bompart being permitted to testify on the ground that he had been convicted and sentenced to the penientiary. In approving this bill the court states: "This bill of exceptions is incorrect in almost every particular. The facts are that defendant's attorney wanted to stop the examination in chief of the witness Oney Bompart and prove by the witness orally that he had been convicted of robbery in connection with this case. The court ruled that this could not be done by

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oral proof, but the record proof must be offered. The defendant's counsel then asked that the clerk be required to produce the record of the conviction. The court informed counsel that the cause was not tried in this court but was transferred to the juvenile court. He took no exception to the language of the court, for the court was telling counsel as a matter of information where he could find record. It is untrue that defendant ever produced the record, or a certified copy of it, or that the court refused to allow time to prove the conviction by the record. The court did rule against him on his contention that he could prove the conviction orally by the witness for the purpose of diqualifying the witness. The court did allow defendant's attorney on cross-examination of the witness for purposes of impeachment to prove by him that the witness had been convicted, and afterward pardoned by the Governor. The only exception he took was to the court's ruling that the witness could not be disqualified by oral proof of his conviction. To this extent only is the bill approved."

If as now contended by appellant he offered in evidence the judgment and record, and the court refused to permit him to introduce same, he should have copied in the bill presented the judgment and sentence which he offered in the bill of exceptions. This was not done, and the record before us does not contain the judgment nor sentence. If the court would not allow him time to get it at that time, he certainly had time during the trial to obtain it, and when he had done so he could have presented a written motion to strike out the testimony of this witness, attaching to it a copy of the judgment and sentence, and thus placed it in the record. In the absence of any such showing we must conclude that the court is correct in his qualification, and it has been the unbroken rule of decision in this court that where one proves orally by a witness that he has been convicted of a felony, and the court admits it solely on the question of credibility of the witness, and the witness also states orally at the time he has been pardoned, it is not error to permit the witness to testify. McNeal v. State, 403 S. W. Rep., 792; Bratton v. State, 34 Texas Crim. Rep., 477.

Those bills that complain that whereas the indictment alleged that "the offense was committed on or about the 3rd day of December, that the court erred in permitting the witnesses to testify that the offense occurred on December 23rd," present no error. The State could prove any date within the period of limitation. (Cudd v. State, 28 Texas Crim. App., 124; Abrigo v. State, 29 Texas Crim. App., 143; Crass v. State, 30 Texas Crim. App., 480; Shuman v. State, 34 Texas Crim. Rep., 69.)

The State's witness testified that on the night of the alleged robbery appellant asked Dodd to come and go with them, when, "Dodd replied he would like to do so, but he had a case against him in County Court." Appellant complains that this testimony was admitted. The State's witness was detailing a conversation had with appellant in

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regard to committing this robbery, and this was a part of the same conversation, and was admissible.

The witness King was permitted to testify that Oney Bompart (State's witness) worked for him and that appellant was with the witness at the time and place stated by him, and he fixed the date by saying that he learned of the robbery next morning. All this testimony was admissible, as it was necessary for the State to corroborate the accomplice testimony, and the accomplice had testified to an agreement to rob had been entered into at King's place of business at that time and on that date.

Mrs. C. J. Brown testified that a few days before the robbery she had loaned appellant some money, and that on the day after the robbery appellant had paid her back. This was admissible as a circumstance in the case. The motorman being robbed of money on Friday night, it was permissible to show that appellant had no money prior to that date, but had money the day after the robbery. One of the street car operators who was robbed testified that in his opinion appellant was one of the men who committed the robbery—who covered him with a pistol while Bompart went through their clothing and got their money. In questions of identity it is always permissible for the witness to thus testify. Brooks v. State, 37 Texas Crim. Rep., 739; Coffman v. State, 51 Texas Crim. Rep., 478; Tate v. State, 38 Texas Crim. Rep., 261.

The witness Smallwood was introduced by the State, and he giving testimony materially damaging to the State's case, counsel for the State stated they were taken by surprise and were permitted to prove that he had made statements materially different to what he testified on the trial. Article 795 of the Code of Criminal Procedure provides that "the rule that a party introducing a witness shall not attack his testimony is so far modified as that any party, when facts stated by the witness are injurious to his cause, may attack his testimony in any other manner except by proving the bad character of the witness." In this case there can be no question that the testimony of Smallwood was injurious to the State, for he testified appellant was not the person who committed the robbery, and under such circumstances the court did not err in permitting witnesses to state what Smallwood had said about appellant being the party who committed the robbery just before going on the stand. (For a list of authorities see section 1046 White's Ann. Code Crim. Proc.)

There was no error in permitting the State to show that shortly after the robbery search was made in Dallas for appellant, and he could not be found, and that he was subsequently arrested at Lubbock, Texas. It is always permissible to show the flight when charged with crime. (Campos v. State, 50 Texas Crim. Rep., 102; Benavides v. State, 31 Texas Crim. Rep., 173, and cases cited in sec. 350, Branch's Crim. Law.)

There are some other bills in the record of the same character as

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those herein ruled on, and we have carefully read each of them, although none of them were filed within the time allowed by order of the court and the laws of this State, but in order that there might be no complaint we have considered and find none of them present reversible error.

The special charges requested insofar as they are the law of the case, were fully covered by the court's main charge, and it was not error for the court to refuse to instruct the jury peremptorily to acquit the defendant. Bompart positively testifies to appellant's participation in the robbery; he is corroborated in many particulars, and the testimony of W. L. Click would be sufficient corroboration of the accomplice to support a conviction.

It was not necessary for the court to charge on circumstantial evidence. The witnesses Bompart and Click made it a case of positive testimony. (See sec. 203, Branch's Crim. Law.)

The court's charge on accomplice testimony has been frequently approved by this court. (Brown v. State, 57 Texas Crim. Rep., 570.) Also the charge on alibi. In fact, the court's charge fully submits every issue raised by the testimony, and the judgment should be affirmed.

We regret to have records come to us in the condition of this case, where counsel for appellant complains so bitterly of the trial court, and especially his action in regard to his bills of exception, but counsel must bring these matters before us in a way authorized by the law, otherwise we can not review the matter. This court must and does presume that the trial judges in this State will act fairly towards all attorneys appearing in their court, and give to persons accused of crime a fair and impartial trial, and this presumption will be indulged until by the record it is made to appear otherwise.

The judgment is affirmed.

Affirmed.

[Delivered March 26, 1913.]

SMITH THOMAS V. STATE.

No. 2178. Decided January 8, 1913.

Rehearing denied March 26, 1913.

1.—Assault to Murder—Statement of Facts—Rehearing.

Where the case was affirmed in the absence of a statement of facts, but it was shown on motion for rehearing that the clerk had inadvertently omitted the same from the record, the case will be heard on its merits.

2.—Same—Reasonable Doubt—Charge of Court.

Where, upon trial of assault to murder, the evidence developed two theories, one, that of the State, that the defendant made the assault with intent to kill, and that of the defense, of perfect self-defense, and the court

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properly charged on the burden of proof, reasonable doubt and the presumption of innocence, there was no error in the court's refusal of defendant's requested charge that there must be a concurrence of the twelve minds of the jurors, etc., with reference to reasonable doubt.

3.—Same—Charge of Court—Self-Defense.

Where, upon trial of assault to murder, the court submitted defendant's theory of self-defense in a proper charge, there was no error.

4.—Same—Charge of Court—Manslaughter—Aggravated Assault.

Where, upon trial af assault to murder, the issue of manslaughter did not arise from the evidence, there was no error in the court's failure to charge on aggravated assault.

5.—Same—Rule Stated—Aggravated Assault.

If a case is either assault to murder or perfect self-defense, it is not error to fail to charge on aggravated assault. Following Johnson v. State, 47 Texas Crim. Rep., 300, and other cases.

6.—Same—Rule Stated—Aggravated Assault.

If the case is either assault to murder or that defendant is guilty of no offense, it is not error to fail to charge on aggravated assault. Following Bramlette v. State, 21 Texas Crim. App., 611, and other cases.

7.—Same—Manslaughter—Rule Stated—Adequate Cause.

If, had death resulted, the issue of manslaughter would not be in the case, it is not error to fail to charge on aggravated assault on the theory of sudden passion aroused by inadequate cause. Following Anderson v. State, 15 Texas Crim. App., 447, and other cases.

Appeal from the Criminal District Court of Harris. Tried below before the Hon. C. W. Robinson.

Appeal from a conviction of assault with intent to murder; penalty, three years imprisonment in the penitentiary.

The opinion states the case.

J. M. Gibson and *W. W. Wander,* for appellant.—On question of statement of facts being left out by inadvertence of clerk: Shaffer v. State, 58 Texas Crim. Rep., 646, 127 S. W. Rep., 206.

On question of court's failure to charge on aggravated assault: Stevens v. State, 38 Texas Crim. Rep., 550; Canister v. State, 46 id., 221; Cooper v. State, 49 id., 28; Goode v. State, 32 id., 505; Slaughter v. State, 34 id., 81.

C. E. Lane, Assistant Attorney-General, for the State.

PRENDERGAST, JUDGE.—Appellant was indicted for an assault with intent to murder, convicted and his penalty fixed at three years in the penitentiary.

There is no statement of facts in the record. In the absence of a statement of facts none of the questions attempted to be raised by appellant can be passed upon by this court. Therefore, the judgment is affirmed.

Affirmed.

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ON REHEARING.

March 26, 1913.

PRENDERGAST, JUDGE.—When this case was affirmed there was no statement of facts on file in this court. Since then the clerk of the lower court has sent up a statement of facts which shows that it was filed in the lower court in ample time and was not sent with the other record, and filed in this cause with the record, by an oversight. This is shown properly by appellant's motion for rehearing. We now pass on appellant's motion for rehearing and the questions raised, considering said statement of the facts.

The evidence shows but two theories. First, by the State, a clear case of assault with intent to kill; second, on behalf of appellant, perfect self-defense.

Appellant had a room, or house rented in Houston where he lived. A certain negro woman who did not live with him came to his house each day to prepare her meals and that of appellant, too. She also did additional cooking and carried what she cooked additionally to an oil mill where the assaulted party, Alexander, and a great many others worked. Alexander, the assaulted party, began his attentions to said woman and, it seems, went to appellant's house for that purpose. This angered appellant and he told Alexander he didn't want him about his house fooling around that woman; that if he wanted the woman to take her away from there, but not come to his house with her. It seems, after this, appellant heard that Alexander had been about his house again fooling with the woman. Appellant, thereupon, armed himself with a pistol and went to the mill where Alexander was at work. Before he saw Alexander there, he saw other friends and acquaintances at the mill. All of the witnesses practically, testify that appellant was mad when he came there and looked mad. One witness for the State testified that when he saw appellant come to the mill mad, he asked him where he was going; appellant told him he was going to see Alexander and that if Alexander started anything he would blow him up. He at once proceeded to call Alexander out and they had some fuss then, appellant demanding to know if he hadn't already told Alexander to stay away from his house about that woman. No fight then occurred. Alexander then left appellant, went around in the mill attending to his work, but very soon came back to where appellant was. The difficulty was renewed between them and, according to the State's testimony, appellant, without any provocation, and, as Alexander said, with his back turned towards him, appellant pulled out a pistol and at close range shot at Alexander. Someone called out to Alexander to look out. He thereupon jumped behind another party and when appellant shot he shot the other party, when shooting at Alexander, the ball passing entirely through the body of the other party. Everybody, parties and witnesses, except appellant then ran and left the scene. When appellant

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first called Alexander to him and attacked him about again going to his house in connection with that woman, Alexander had a knife in his hand, he says, holding it as if sharpening a pencil. No one claims that he at that time made any attack or attempted attack upon appellant. When he returned to the scene after he had gone around in the mill attending to his duties, he still had the knife in his hand. Appellant and his witnesses claim that Alexander then attacked him with the knife and made at him as if to cut him, and that, thereupon, appellant in self-defense, and only in self-defense, shot at Alexander, but instead of hitting him, shot the other fellow behind whom Alexander took refuge.

It will be thus seen, as stated above, that there were only two theories presented. The State's that of an assault with intent to kill, solely and simply; that of the defendant, perfect self-defense solely.

Among others, appellant requested this special charge, which was refused: "Upon the trial of the criminal case by a jury, the law contemplates the concurrence of twelve minds in the conclusion of guilt before conviction can be had. Each individual juror must be satisfied beyond a reasonable doubt of the defendant's guilt before he can, under his oath, consent to a verdict of guilty. Each juror should feel the responsibility resting upon him as a member of the jury and should realize that his own mind must be convinced beyond a reasonable doubt of the defendant's guilt, before he can consent to a verdict of guilty. Therefore, if any individual member of the jury after having duly considered all the evidence in the case and after consultation with his fellow jurors, should entertain such reasonable doubt of defendant's guilt, as is set forth in their instructions in this case it is his duty not to surrender his own convictions simply because the balance of the jury entertains different convictions."

The court properly charged as the statute requires that the burden of proof was upon the State and that the defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt and "in case you have a reasonable doubt as to defendant's guilt, you will acquit him and say by your verdict not guilty." This was all the charge the court should have given. In no case should the court give such a charge as that above requested.

The court, in the main charge, correctly submitted the State's theory of the case to the jury, requiring the jury to believe, beyond a reasonable doubt, that if the appellant assaulted said Alexander with a deadly weapon and with malice and with intent to kill and murder him, and that said assault was not committed in self-defense, to convict him. Then the court submitted in accordance with the issue raised by the facts, appellant's self-defense in a proper charge, and told them that if he committed the assault to defend himself from either losing his life or serious bodily injury at the hands of Alexander to acquit him. The court correctly refused appellant's requested

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charge to the effect that if defendant shot one McElroy intending to shoot Alexander and did not shoot Alexander, then to acquit him.

We have carefully considered all of appellant's requested charges and complaints to the court's charge and in our opinion, none of them present any error. It is unnecessary to take them up and discuss them separately.

No question of manslaughter would have been raised by the evidence if appellant had killed Alexander, and as only an assault to murder on the one hand, and perfect self-defense on the other, arose and the court properly submitted these issues, which were found against appellant, the court should not have charged on aggravated assault. On these subjects Mr. Branch, in his Criminal Law, in section 521, correctly lays down these propositions: First, if a case is either assault to murder or perfect self-defense, it is not error to fail to charge on aggravated assault, citing Johnson v. State, 47 Texas Crim. Rep., 300, 85 S. W., 312; Moore v. State, 31 Texas Crim. Rep., 234, 20 S. W., 563; Moore v. State, 53 Texas Crim. Rep., 113, 107 S. W., 833; Moody v. State, 509 S. W., 894; Duval v. State, 70 S. W., 543; Barnes v. State, 39 Texas Crim. Rep., 184, 45 S. W., 495; Phillips v. State, 36 S. W., 86; Phillips v. State, 306 S. W., 441.

Second, if the cases is either assault to murder or that defendant is guilty of no offense, it is not error to fail to charge on aggravated assault. Bramlette v. State, 21 Texas Crim. App., 611, 2 S. W., 765; Harris v. State, 47 S. W., 643; Pugh v. State, 2 Texas Crim. App., 539; Sims v. State, 4 Texas Crim. App., 144; Winn v. State, 5 Texas Crim. App., 621; Ford v. State, 56 S. W., 338; Collins v. State, 6 Texas Crim. App., 72; Baker v. State, 7 Texas Crim. App., 612; Halliburton v. State, 34 Texas Crim. Rep., 410, 31 S. W. Rep., 297; Schrimscher v. State, 36 Texas Crim. Rep., 461, 37 S. W. Rep., 864; Colbert v. State, 52 Texas Crim. Rep., 486, 107 S. W. Rep., 1115; Harding v. State, 60 Texas Crim. Rep., 327, 131 S. W., 1092.

Third, if had death resulted, the issue of manslaughter would not be in the case, it is not error to fail to charge on aggravated assault on the theory of sudden passion aroused by inadequate cause, citing Anderson v. State, 15 Texas Crim. App., 447; Harris v. State, 47 S. W., 643; Barbee v. State, 34 Texas Crim. Rep., 129, 29 S. W., 776; Ayres v. State, 26 S. W. Rep., 396; Taylor v. State, 17 Texas Crim. App., 46; Granger v. State, 24 Texas Crim. App., 45, 5 S. W. Rep., 648; Rider v. State, 26 Texas Crim. App., 334, 9 S. W. Rep., 688; Summers v. State, 33 S. W. Rep., 124.

There being no reversible error shown, the motion for rehearing is overruled.

Overruled.

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JOHN PONDER V. STATE.

No. 2326. Decided March 26, 1913.

1.—Aggravated Assault—Evidence—Undisclosed Motive.

Where, upon trial of aggravated assault, the court permitted the alleged assaulted party to testify that a few moments before the difficulty, he put his pistol in his pocket on account of the information he had received from the clerk of the hotel with reference to defendant—of all of which defendant had no knowledge, the same was reversible error.

2.—Same—Evidence—Codefendant.

Until a party is indicted, he is not rendered incompetent to testify in behalf of a codefendant, and where the court excluded such testimony, the same was reversible error. Following Scroggin v. State, 30 Texas Crim. App., 92, and other cases.

3.—Same—Charge of Court—Provoking Difficulty—Converse of Proposition.

Where the evidence raised the question as to whether defendant provoked the difficulty, and there was testimony pro and con, the court should have submitted, where he charged on provoking the difficulty, the converse of the proposition. Following Gaines v. State, 58 Texas Crim. Rep., 631.

Appeal from the District Court of Hopkins. Tried below before the Hon. R. L. Porter.

Appeal from a conviction of aggravated assault; penalty, a fine of $800 and eight month's confinement in the county jail.

The opinion states the case.

Crosby, Hamilton & Harald and *Dinsmore, McMahan & Dinsmore,* and *C. E. Sheppard,* for appellant.—On question of testimony of codefendant: Article 791, Code Criminal Procedure, and cases cited in opinion; Thomas v. State, 66 Texas Crim. Rep., 326, 146 S. W. Rep., 878.

On question of the court's charge on provoking the difficulty: Gaines v. State, 58 Texas Crim. Rep., 631, 127 S. W. Rep., 181; Walker v. State, 63 Texas Crim. Rep., 499, 140 S. W. Rep., 455; McCandless v. State, 57 S. W. Rep., 572; Carden v. State, 62 Texas Crim. Rep., 607, 138 S. W. Rep., 396; Craiger v. State, 48 Texas Crim. Rep., 500.

C. E. Lane, Assistant Attorney-General, for the State.

DAVIDSON, PRESIDING JUDGE.—Appellant was convicted of aggravated assault. The court permitted the witness and assaulted party, Taylor, to testify that a few moments before the difficulty he got his pistol out of his grip at the hotel and put it in his pocket. This was just before he went out of the door of the hotel. After going out of the hotel appellant called him. They went to one side and had a conversation; that he put his pistol in his pocket on account of information he had received from the clerk of the hotel. The clerk's name was Williams. This was claimed to be information conveyed to him by

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Williams that appellant was there to see Taylor. In connection with this the State's contention was that the defendant and Bob Jennings went to the hotel where the alleged assaulted party Taylor was stopping for the purpose of having a difficulty with him, and that after calling him to one side, appellant made an assault upon Taylor, the indictment charging that assault to be with intent to murder. Appellant's theory of the case was that he went to the hotel to see Taylor and Jennings went with him. That he was there to ask an explanation of Taylor in regard to certain statements which he had been informed Taylor had been making about him, the defendant, in regard to either him, appellant, or his oil mill, with which he was connected, had been wronging and defrauding and cheating his customers out of their cotton seed by means of false weights. The State's theory was that appellant called Taylor to one side and provoked a difficulty with him. Appellant's theory was that he went to Taylor to ask why he was talking as he had been informed he was talking, and to seek an explanation, and not to have a difficulty, and that Taylor shot at him with a pistol, and then shot Jennings. The testimony was inadmissible. Appellant knew nothing of the fact that Taylor was armed, or that Williams had informed him of the fact that appellant was there. This testimony conveyed the idea and was intended to convey the idea to the minds of the jury that by means of this conversation between Williams and Taylor that appellant was there for the purpose of provoking a difficulty, and, therefore, Taylor armed himself to defend himself against an anticipated attack by defendant. As before stated, this evidence was inadmissible against appellant. He had no knowledge of it, and was not chargeable with what occurred between third parties. He is to be judged by his own intents and not what others believed or thought.

Another bill of exceptions recites that the court erred in refusing to permit the witness Jennings to testify. Jennings' testimony was very material to defendant, and would have controverted in almost every particular the testimony of Taylor. The State's objection to the witness testifying was based on the ground that he was jointly charged with appellant with the assault upon Taylor, and, therefore, could not testify. The bill of exceptions shows that Jennings had been arrested and bound over by the magistrate to await the action of the grand jury, but had never been indicted, the grand jury having adjourned. There is a statement to the effect that it was anticipated the grand jury would be recalled during the term, but it is not shown even that this would be with reference to Jennings' case. The action of the court sustaining the State's objection to the witness Jennings testifying was based on an article of the Code of Criminal Procedure which provides that persons charged as principals, accessories or accomplices, whether in the same or in different indictments, cannot be introduced as witnesses for one another. This article has been construed by this court in Scroggin v. State, 30 Texas Crim. App. 92,

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and in Campbell v. State, 30 Texas Crim. App. 645, to apply only to parties who have been indicted. Those decisions lay down the doctrine and hold that until the party is indicted that he is not rendered incompetent to testify in behalf of a co-defendant on his trial. Under these decisions the court was in error. Jennings was a competent witness, and his testimony should have gone before the jury.

The court gave a charge on provoking a difficulty. It is questionable whether provoking a difficulty was in the case; if so, it was raised upon the testimony of Taylor to the effect that when appellant called him with reference to these reports and statements in regard to appellant's cheating and defrauding people who sold to his mill, and during this conversation struck Taylor with his fist. If this testimony raises the issue of provoking a difficulty, which the writer does not believe, then it was necessary under the testimony of the defendant to charge the converse of the proposition. He emphatically denies Taylor's testimony, and in his evidence shows he did not provoke any difficulty, but that upon asking Taylor about the matter, Taylor, in substance, reiterated his statements or used language which indicated that he was repeating or standing by what he had said, and shot at appellant, and then turned his pistol back and shot Jennings. If upon another trial the court should see proper to charge on provoking a difficulty, the converse of the proposition should be given. A charge on provoking a difficulty is only given or authorized as a limitation upon the right of self-defense. The court having given a charge on provoking a difficulty and thus limiting the right of self-defense, he should have charged the converse of the proposition on appellant's theory of the case, that if he did not provoke the difficulty and Taylor was the attacking party, his right of self-defense would not be affected. See Gaines v. State, 58 Texas Crim. Rep., 631.

It is deemed unnecessary to go into a detailed statement of the evidence adduced on the trial. It would serve no practical purpose.

For the errors indicated the judgment is reversed and the cause is remanded.

Reversed and remanded.

SAM BOGUE V. STATE.

No. 2381. Decided March 26, 1913.

Rehearing denied April 23, 1913.

1.—Murder—Sufficiency of the Evidence—Manslaughter.

Where, upon trial of murder and a conviction of manslaughter, the evidence supported even a higher grade of the offense, while defendant's testimony showed justifiable homicide, the conviction is sustained.

2.—Same—Evidence—Motive—Remarks by Judge.

Where, upon trial of murder, it appeared that all the testimony admitted was necessary to render intelligible that part of it as to what defendant said about killing deceased, there was no error, and the remark of the court when the objection thereto was made could not have been hurtful to the defendant.

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3.—Same—Evidence—Husband and Wife—Cross-Examination—Moral Turpitude.

Where defendant's wife had been introduced as a witness to testify to material facts in behalf of her husband, the defendant, there was no error in permitting the State to prove by her that she had been convicted of the offense of keeping a disorderly house, which was an offense involving moral turpitude.

4.—Same—Evidence—Immaterial Matter.

Upon trial of murder, there was no error in excluding testimony that the State's witness had a pistol on the day prior to the homicide.

5.—Same—Evidence—Trespasser.

Upon trial of murder, there was no error in permitting the State's witness to testify that he heard defendant say two days prior to the homicide that he had authorized deceased and others to pick the cotton in dispute, to show he was not a trespasser.

6.—Same—Argument of Counsel.

In the absence of a bill of exceptions or a requested charge, complaints as to arguments of counsel cannot be considered on appeal.

7.—Same—Sufficiency of the Evidence.

Where, upon trial of murder and a conviction of manslaughter, the evidence, under a proper charge of the court, sustained the conviction, there was no error.

Appeal from the District Court of Van Zandt. Tried below before the Hon. R. W. Simpson.

Appeal from a conviction of manslaughter; penalty, four years imprisonment in the penitentiary.

The following statement by the Assistant Attorney-General is substantially correct: The theory of the State, as shown by the statement of facts, is that appellant was the son-in-law of L. J. Kinard, deceased, and that he (appellant) had executed a note payable to his father, R. E. Bogue, and that L. J. Kinard, deceased, and John Goode were his sureties on this note; that the father, R. E. Bogue, was threatening suit against appellant and his sureties, and for the purpose of paying this note the said John Goode and deceased, L. J. Kinard, had procured the consent of appellant to enter upon his premises and gather cotton enough from his field to pay said note; that after consenting that Goode and Kinard should so enter and gather said cotton the father, R. E. Bogue, persuaded appellant not to permit the parties to gather his cotton, and there is some evidence of the State tending to show that R. E. Bogue sent for appellant on the morning of the killing, furnished him with a gun and was an accomplice to the killing. The State's theory is further that appellant fired the first shot and at a time when deceased was not making any demonstration to injure appellant. Appellant offers no testimony disputing the right of deceased and Goode to be in the cotton patch, but he does offer testimony tending strongly to show that deceased fired two shots at him before he shot and killed deceased.

T. R. Yantis and *Wynne, Wynne & Gilmore*, for appellant. On question of permitting State on cross-examination of defendant's wife

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to show that she had been convicted for running a disorderly house: Johnson v. State, 28 Texas Crim. App., 17; Jones v. State, 38 Texas Crim. Rep., 87; Gaines v. State, 38 id., 202.

On question of argument of counsel: Thompson v. State, 43 Texas, 268; Hatch v. State, 8 Texas Crim. App., 416; Clark v. State, 23 id., 260; Stone v. State, 22 id., 185; Sterling v. State, 15 id., 249; Ricks v. State, 19 id., 308.

C. E. Lane, Assistant Attorney-General, for the State.

HARPER, JUDGE.—Appellant, when tried, was convicted of manslaughter, and his punishment assessed at four years confinement in the penitentiary.

Without detailing the testimony it is sufficient to say that the testimony offered in behalf of the State would support a verdict for even a higher grade of the offense—while the testimony offered in behalf of appellant would show that he was justifiable in slaying his father-in-law, L. J. Kinard. Under such circumstances, we merely review the record to see if the court committed any error in the trial of the case.

The first bill complains of the testimony of John Goode in certain respects. This witness testified that shortly before the trial he had a conversation with appellant which is detailed as follows: "I had a talk since that with defendant down at Dennis Easley's cow pen, I think probably the latter part of April or it might have been in May, I would not be positive as to the date. That conversation started about this note that I was on and he paying of that note, which has not been paid up to this time. Old man Bogue was suing me on it at that time, he told me, on this same note. I was asking Sam was he going to let me pay that note, and he said, 'No, I have done made settlement with old Dick on that.' Old Dick was his daddy. He said 'He promised if I would kill Kinard to give me that note and pay all the costs in the case, and the old son-of-a-bitch now wants me to pay the lawyer fees, and I will kill him before I will do it.' (That was 'Old Dick.')" Appellant objected to that part of the statement about old man Bogue suing him on the note. When we read the entire statement, it is seen that all of it was clearly admissible to render intelligible that part relating to the reason that witness said appellant gave as a reason why he killed deceased, that is, his father had agreed not to collect the note if he would kill Kinard. And the remark of the court, when the objection was made, could not have been hurtful to defendant and was not upon the weight to be given the testimony.

It was permissible for the State to prove by the wife of defendant that she had been convicted of the offense of running a disorderly house. She had been introduced to prove material facts in behalf of the defendant, and this testimony was admissible as affecting her credit as a witness. The offense was one involving moral turpitude.

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It was immaterial whether or not the witness John Goode had a pistol on the day prior to the homicide, and he could not be impeached on this immaterial matter, therefore, the court did not err in excluding the testimony of the witness Seals and Loper on this issue.

As to the question of whether or not deceased was a trespasser on the premises of appellant, the court did not err in permitting the witness Martin to testify that he heard appellant two days prior to the homicide state that he had authorized deceased and others to pick this cotton, and apply it to the payment of debt of appellant for which they were bound as sureties.

The complaints in the motion for new trial in regard to the argument of the prosecuting officer cannot be considered, as they are not verified by any bills of exception, nor were there any special charges requested in regard thereto.

The charge of the court was a fair presentation of every issue in the case. The evidence offered in behalf of the State amply supports the verdict, and there is no matter in the motion for a new trial which could or should call for a reversal of the case.

The judgment is affirmed.

Affirmed.

[Rehearing denied April 23, 1913.—Reporter.]

ED. NICKERSON V. STATE.

No. 2213. Decided February 26, 1913.

Rehearing denied March 26, 1913.

1.—Aggravated Assault—Officer—Arrest—Warrant—Serious Bodily Injury.

Where the indictment charged the defendant with an assault upon an officer, and also by inflicting serious bodily injury, and the evidence showed that the officer had no warrant to arrest defendant, etc., but that the latter inflicted serious bodily injury, the conviction could, nevertheless, be sustained for aggravated assault; especially, where the court submitted simple assault also.

2.—Same—Aggravated Assault—Serious Bodily Injury.

Where the evidence showed that defendant was illegally arrested and that he made no effort to effect his release, but used abusive language towards the officer, who struck him, whereupon defendant inflicted upon said officer serious bodily injury, he was guilty of aggravated assault.

3.—Same—Charge of Court—Requested Charges.

Where, upon trial of aggravated assault, defendant's requested charges were substantially given in the court's main charge, there was no error.

4.—Same—Peremptory Instructions.

Where, upon trial of aggravated assault, the evidence sustained the conviction, there was no error in the court's failure to submit a peremptory charge to acquit.

5.—Same—Misdemeanor—Bill of Exceptions.

In the absence of bills of exception to the ruling of the court in misdemeanor cases, the grounds in the motion for new trial cannot be considered on appeal. Following Basquez v. State, 56 Texas Crim. Rep., 329.

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6.—Same—Sufficiency of the Evidence.

Where, upon trial of aggravated assault for inflicting serious bodily injuries, the evidence sustained the conviction, there was no error.

Appeal from the County Court of Grayson. Tried below before the Hon. J. Q. Adamson.

Appeal from a conviction of aggravated assault; penalty, a fine of $500 and twelve months confinement in the county jail.

The opinion states the case.

B. L. Jones and *Hamp P. Abney* and *J. W. Hassell*, for appellant. On question of serious bodily injury: George v. State, 17 S. W. Rep., 351; Halsell v. State, 18 S. W. Rep., 418; Black v. State, 67 S. W. Rep., 113; Head v. State, 52 Texas Crim. Rep., 488, 107 S. W. Rep., 829; Wilson v. State, 29 S. W. Rep., 41.

C. E. Lane, Assistant Attorney-General, for the State. On question of illegal arrest: Miers v. State, 34 Texas Crim. Rep., 161; Russell v. State, 37 id., 314.

HARPER, JUDGE.—Appellant was convicted in the County Court of an aggravated assault, and prosecutes this appeal.

The facts would show that Nannie Nickerson called Deputy Sheriff Hamilton over the telephone and reported to him that appellant was causing trouble, and requested his arrest. The officer went to their home, found appellant in bed and arrested him. Appellant got up, put on his clothes, and asked the officer what he was going to do with him, when the officer told him he was going to take him to jail for the row he had with his wife. Appellant went with the officer a short distance, and then the officer says appellant straightened up and remarked, "All the officers in this town are God-dam-sons-of-bitches," when the officer struck him; appellant grabbed the officer, threw him down, and the officer says, "struck him several times about the head, badly cut his lip, skinned and bruised up his head, and badly bruised and beat his face." Another officer came up, when appellant and Officer Hamilton were parted.

It is unquestioned that the officer had no warrant when he made the arrest, and the offense against appellant's wife was not committed in his presence nor in his view. The information contained two grounds alleging aggravated assault: one that appellant committed an aggravated assault in and upon an officer in the lawful discharge of his duties. If this was the only ground alleged the conviction could not be sustained, because the evidence shows that the officer had no warrant, and the offense for which appellant was arrested was not committed in the presence of the officer. (Williams v. State, 64 Texas Crim. Rep., 491, 142 S. W. Rep., 899.) But the complaint also charges that "appellant did then and there unlawfully strike, wound and bruise the said W. T. Hamilton, and did thereby inflict upon the

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said Hamilton serious bodily injury against the peace and dignity of the State."

It is unquestionably the law of this State, as contended by appellant, that a person illegally or unlawfully arrested has a right to use all necessary force to effect his release, *when the force is used for that purpose,* but one, even though illegally arrested, would not have the right to maliciously assault an officer any more than any other citizen. Does the evidence in this case suggest that the assault was made by appellant to effect his release from an unlawful arrest? Appellant did not testify nor offer any evidence. The only testimony in the record is that of Officers Hamilton and Stark, and their testimony does not even remotely suggest that appellant was actuated by that motive in making the assault on Hamilton. The officer says when he arrested appellant he offered no protest or objection, but went quietly with him a short distance, and then, without provocation, uttered the abusive epithet, when Hamilton struck him. The officer should not have struck his prisoner, and it may be that he is guilty of an offense for so doing, but he is not on trial in this case. However, as appellant used language that any sane man knows will provoke a difficulty, if the party to whom it is addressed has any manhood about him, neither can he justify his subsequent conduct by reason of this blow, although the court in his charge instructed the jury that appellant had the right to defend himself if he used no greater force than was necessary to protect himself.

The court also instructed the jury that a peace officer has no right to arrest an offender without warrant when an offense is not committed in his presence or within his view, and if the jury believed that appellant assaulted Hamilton to free himself from an illegal arrest, to acquit him. When these instructions were given by the court in his charge we do not think anyone can seriously contend that appellant was convicted under the first count in the information, but it is manifest that the jury convicted him under the second count, and the authorities cited by appellant are not applicable. It would be a strange doctrine to announce, that although one is illegally arrested, he may assault and maltreat an officer when not done for the purpose of effecting his release from such illegal arrest, but is wantonly and maliciously done. The evidence does not suggest that appellant knew or even had a suspicion that the officer had no warrant at the time he made the insulting remark and beat and bruised the officer, and under these circumstances, where the court instructs the jury that if appellant made the assault to effect his release from arrest to acquit him, and there are two grounds of aggravation in the information, we cannot hold that the court erred in overruling the motion for new trial on that ground.

Appellant's special charge No. 1 reads as follows: "In this case you are instructed that no verbal provocation and no epithet applied to another authorizes such other in inflicting an assault upon the per-

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son applying such epithet, and even though you may believe from the evidence that the defendant applied to officers an opprobrious epithet, and that the said Hamilton, after he had so applied said epithet, struck defendant, the defendant would still be entitled to defend against the attack so made by the said Hamilton, and to use all force necessary to repel such attack and if you so believe the facts to be you will find him not guilty." This was given by the court in his main charge, therefore, it was unnecessary to again so instruct the jury.

Appellant's second special charge which, in effect, requested the court to instruct the jury to acquit appellant if he had been illegally arrested regardless of his motive in assaulting the officer, is not the law under the evidence in this case, where the information contains a count charging an assault inflicting serious bodily injury. Special charge No. 3 requested was fully covered by the court in his main charge.

The only other bill of exceptions in the record complains that the court erred in not giving a peremptory instruction. For the reasons hereinbefore stated this bill presents no error.

This being a misdemeanor, the other grounds in the motion for new trial to which no bill of exceptions was reserved cannot be reviewed. (Basquez v. State, 56 Texas Crim. Rep., 329.)

The ground in the motion presenting the issue that the evidence will not sustain a conviction for aggravated assault is the most serious question in the case. To do so the evidence must show that serious bodily injury was inflicted. The court, however, in his charge, submitted both aggravated assault and simple assault, and under the evidence of Mr. Hamilton we do not feel that we would be justified in holding that the injuries received were not serious injuries. He says his lip was cut, his face badly beaten and bruised, and his head skinned and bruised.

The judgment is affirmed.

Affirmed.

[Rehearing denied March 26, 1913.—Reporter.]

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INDEX.

Absence of Juror. See Jury and Jury Law, 6.

Absent Witness. See Reproduction of Testimony.

1. When it is once shown that a witness had permanently removed beyond the jurisdiction of the court, it is not necessary to show his exact whereabouts on the day of the trial. Following Smith v. State, 66 Texas Crim. Rep., 593. Qualifying Ripley v. State, 58 Texas Crim. Rep., 489. Whorton v. State, 1.

2. Where the State showed the absence of a witness on a former trial and inferentially left the impression that the testimony of the said absent witness was favorable to the State, the defendant should have been permitted to show that such testimony was favorable to defendant, and a refusal to permit him to do so was reversible error. Following Sweeney v. State, 65 Texas Crim. Rep., 593. Green v. State, 485.

Accessory. See Bribing Witness; Definition of Accessory; Principles, 3.

1. Where the testimony introduced, upon trial of an accessory after the fact to the crime of seduction, was admissible against the principal, the same was admissible against the accessory; however, the details of the operations to produce an abortion and the suffering it entailed would not have been admissible if the same had been properly excepted to. Following Tubb v. State, 55 Texas Crim. Rep., 606, and other cases. Harrison v. State, 291.

2. Where, upon trial of an accessory after the fact to the crime of seduction, it appeared from the record on appeal that the defendant in order to prevent his principal from being indicted, arrested and tried, spirited away or hired the material State's witnesses to leave the county so that they could not be had before the grand jury or the trial of said principal before the court, held that this is such aid personally and directly to the offender as would make the defendant an accessory after the fact, under Article 86, Penal Code. Following Blakely v. State, 24 Texas Crim. App. 616. Qualifying Caylor v. State, 44 Texas Crim. Rep., 118, and other cases. Id.

Accidental Killing. See Self-defense, 10.

Accommodation. See Sale.

Where, upon trial of unlawfully pursuing the occupation of selling intoxicating liquors in local option territory, the defendant claimed that he ordered the liquor as an accommodation to the parties to whom he was alleged to have sold it, and also claimed that he collected the money therefor before he ordered it, and the court's charge in this respect specifically submitted the defendant's theory, there was no error. Wilson v. State, 567.

Accomplice. See Charge of Court, 1. Continuance, 7; Incest; Rule Stated, 6; Theft of Horse, 4.

1. Where the charge of the court on accomplice testimony followed approved precedent, there was no error. Following Brown v. State, 57 Texas Crim. Rep., 570, and other cases. Pace v. State, 27.

2. Upon trial of receiving stolen property, the acts and declarations of the persons alleged to have stolen the property after the theft, in the absence of the defendant, were inadmissible; and especially, where the same was not properly limited by the court. Forrester v. State, 62.

3. Even if the testimony did not require the submission of the issue of accomplice, it is not shown in the record on appeal how a charge of accomplice testimony was prejudicial to the defendant. Davis v. State, 86.

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Accomplice—Continued.

4. Where the State claimed that the defendant burned the alleged house by employing another to do so and the court submitted a general charge on the corroboration of accomplice's testimony, but failed to direct the attention of the jury to the fact that the corroboration should be as to whether defendant employed State's witnesses to burn the house, and a special charge submitting this issue was requested, the same should have been given. Baggett v. State, 145.

5. Where, upon trial of burglary, the court's charge on accomplice testimony followed approved precedent, there was no error. Following Tucker v. State, 58 Texas Crim. Rep., 271. Bellew v. State, 363.

6. Where defendant was indicted as an accomplice to the murder of A and the State was permitted to introduce evidence over defendant's objection that he had procured his principal to kill M, the same was reversible error, as there was no allegation in the indictment that defendant advised his principal to kill the latter. Cooper v. State, 405.

7. Where, upon trial of theft of a horse by an accomplice, the State introduced the accomplice in another offense prior to the theft for which defendant was being tried, and which said witness was neither directly nor indirectly connected with the theft of the instant case, there was no error in the court's failure to charge either that said witness was an accomplice in the instant case, or that he was an accomplice in the other theft which was purely collateral matter. Bailey v. State, 474.

8. Where, upon trial of an accomplice to the theft of a horse, the evidence did not raise the issue of accomplice with reference to the purchaser of said horse, there was no error in the court's failure to charge thereon. Id.

9. Upon trial of burglary, where it developed that the case against the State's witness for a similar offense had been dismissed, it was error to permit the State to show that the State's witness had substantially testified in the Justice Court as he did on the trial, such testimony was not admissible either for the purpose of corroboration or impeachment. Harper, Judge, and Prendergast, Judge, dissenting. Gusemano v. State, 557.

10. Where it became necessary to corroborate the accomplice testimony relating to an agreement at a certain place to commit the alleged robbery, there was no error in admitting testimony that the accomplice and the defendant were seen at that place, fixing the time by the occurrence of the said robbery. Perry v. State, 644.

11. Where, upon trial of robbery, the court instructed on alibi and accomplice testimony according to approved precedent, there was no error. Following Brown v. State, 57 Texas Crim. Rep., 570. Id.

Acquittal of Codefendant. See Newly Discovered Evidence, 10.

Adequate Cause. See Manslaughter.

1. A slanderous report in regard to anyone is not made statutory adequate cause, and unless adequate cause existed and the same produced such anger, etc., as to render the mind incapable of cool reflection, the homicide is not reduced to manslaughter. Cloud v. State, 76.

2. Where all the requested charges on manslaughter were covered by the court's main charge, except two, which were not the law of the case on adequate cause, there was no error; besides, the court properly submitted the issue of manslaughter. Manley v. State, 502.

3. Where, upon trial of murder, the court, in submitting a charge on manslaughter, properly instructed the jury as to what would constitute adequate cause under the evidence, there was no error. McKelvey v. State, 538.

4. If, had death resulted, the issue of manslaughter would not be in the case, it is not error to fail to charge on aggravated assault on the theory of sudden passion aroused by inadequate cause. Following Anderson v. State, 15 Texas Crim. App., 447, and other cases. Thomas v. State, 649.

Adultery. See Jurisdiction, 2.

Where, upon trial of unlawfully living together in adultery, the evidence showed that both parties were married at the time to other parties and that

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Adultery—Continued.
they lived together practically as man and wife, and the evidence further circumstantially showed that they had sexual intercourse while thus living together, the conviction was sustained. Brown v. State, 138.

Advertisement.
Where, upon trial of unlawfully practicing medicine, the State was permitted to introduce in evidence defendant's advertisement by which he offered to practice medicine, there was no error, although the advertisement did not in so many words state that he was a practitioner or physician. Mueller v. State, 158.

Affidavit. See Escape; Matters Occurring After Trial; Misconduct of Jury, 8, 11; Newly Discovered Evidence; Attorney and Client; Verdict by Lot, 3.

Age of Witness. See Evidence, 3.
There was no error in permitting the State to introduce testimony of the age of the State's witness. Byrd v. State, 35.

Agency.
Where the evidence showed a specific and direct sale of intoxicating liquors by defendant to the witness, the court did not err in not submitting the question of agency to the jury, and in not charging that the question of alibi was thereby not affected. Ellis v. State, 468.

Aggravated Assault. See Deadly Weapon; Serious Bodily Injury; Rule Stated, 9.
1. Where, upon trial of assault with intent to murder, the court charged on the issue of aggravated assault, there was no error in the court's failure to submit subdivision 7 and 8 of Article 1022, Penal Code, the evidence showing that the defendant was within shooting distance of the party injured when he fired with a shotgun. Bussey v. State, 98.
2. Where, upon trial of aggravated assault by an adult male upon a female, the evidence showed that defendant indecently fondled the person of the prosecutrix without her consent, the conviction was sustained and a fine of $200 and twelve months' confinement in the county jail was not excessive. Cuellar v. State, 155.
3. Where serious bodily injury was alleged as a cause of aggravation in a trial for aggravated assault, and the evidence did not show any such serious bodily injury inflicted upon the party alleged to have been injured, the conviction can not be sustained. Parish v. State, 254.
4. Where, upon trial of assault with intent to murder, defendant attempted to introduce testimony as to improper relations between his wife and the alleged injured party, but the record showed that he had since frequently met such injured party in a friendly way, the same was inadmissible to reduce the degree of the offense, even if the statements of facts and bills of exception were considered. Martinez v. State, 280.
5. The statute is broad enough to embrace any instrument with which a whipping may be administered, is done under circumstances which would inflict disgrace. Caples v. State, 394.
6. Where defendant was under twenty-one years of age and made an assault upon a female, there was no error in the court's failure to charge on aggravated assault upon trial of assault with intent to rape, the jury convicting him of this offense, and the court charging on simple assault. Fuller v. State, 534.
7. Where, upon trial of murder, there was no evidence that the knife used was a deadly weapon and the idea that defendant intended to kill deceased was excluded by the evidence, the court should have submitted a charge on aggravated assault. Hysaw v. State, 562.
8. Where, upon trial of assault to murder, the issue of manslaughter did not arise from the evidence, there was no error in the court's failure to charge on aggravated assault. Thomas v. State, 649.

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Aggravated Assault—Continued.

9. If the case is either assault to murder or that defendant is guilty of no offense, it is not error to fail to charge on aggravated assault. Following Bramlette v. State, 21 Texas Crim. App., 611, and other cases. Id.

10. Where the indictment charged the defendant with an assault upon an officer, and also by inflicting serious bodily injury, and the evidence showed that the officer had no warrant to arrest defendant, etc., but that the latter inflicted serious bodily injury, the conviction could, nevertheless, be sustained for aggravated assault; especially, where the court submitted simple assault also. Nickerson v. State, 659.

Agreement in Other Case.

Upon trial of unlawfully pursuing the occupation of selling intoxicating liquors in local option territory, it was reversible error to introduce in evidence an agreement between defendant and the county attorney in another case, in which defendant was charged with violating the local option law, and which agreement provided that defendant would not engage in the business of selling intoxicating liquors in the county of the prosecution while local option was in force in said county, etc., all of which had no connection with the instant case. Todd v. State, 610.

Agreement of Immunity. See Immunity.

Alibi. See Accomplice, 11; Agency; Assault to Rape, 1, 3; Assault to Rob; Circumstantial Evidence, 2; Declarations and Acts of Defendant, 1; Imputing Crime to Another, 4.

1. Where, upon trial of theft of a horse, the defensive theory was an alibi and the inculpatory evidence was circumstantial and there was also evidence that defendant might be guilty as an accomplice or accessory, the court's charge on principles that defendant would be guilty as principal, although he was not present, etc., was reversible error. La Fell v. State, 307.

2. Where, upon trial of aggravated assault, the evidence did not raise the issue of alibi, there was no error in the court's failure to charge thereon. Caples v. State, 394.

3. Where, upon trial of a violation of the local option law, the evidence raised the issue of alibi and the court gave a correct charge thereon, the contention that the use of the words "that if the offense was committed as alleged" was on the weight of the evidence was untenable. Ellis v. State, 468.

4. Where defendant claimed an alibi upon trial of theft, and the court gave a proper charge thereon, there was no error. McGee v. State, 580.

5. Where, upon trial of murder, the defense was an alibi, and the court properly submitted this issue, there was no error; the evidence sustaining the conviction. Christie v. State, 598.

Allusion to Defendant's Failure to Testify. See Misconduct of Jury; Self-serving Declaration, 3.

1. Where, upon trial of theft of property of the value over $50, State's counsel, in his argument, stated that defendant was not put on, in connection with his argument on defendant's reputation, the same was an allusion to defendant's failure to testify; especially, as the court refused to hear the testimony on this point on motion for new trial, which defendant offered to submit orally instead of by affidavit. Manley v. State, 169.

2. Upon trial of incest, where State's counsel called attention to the fact that no one was present when the alleged act of intercourse occurred than the defendant and prosecuting witness, and further stated that the act did take place and that no one denied it, this was an allusion to defendant's failure to testify, and was reversible error. Vickers v. State, 628.

Almanac.

Where the testimony did not show that there was moonlight at the time of the alleged assault, and the hour was not definitely fixed, the exclusion of an almanac as testimony to show that the moon was down at a certain time of night was not material. Caples v. State, 394.

Animus. See Motive, 2.

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Appeal Bond.

Where, upon appeal from a conviction of the stock law, the record showed that appellant did not enter into a recognizance during term time, but after adjournment entered into an appeal bond, this court has no jurisdiction. French v. State, 316.

Appeal Pending.

This court judicially knows that the former appeal in this case was decided and the cause reversed and no motion for rehearing made at the time the lower court called a special term of the District Court to change the venue of such case; that the mandate was issued and sent to the lower court and must have been filed prior to the convening of said special term, therefore, said trial court had power and jurisdiction to change the venue in such case in said special session; besides, no order with reference to said case was made at the time of calling and convening said special session. Davidson, Presiding Judge, dissenting. Mayhew v. State, 187.

Application for Continuance. See Continuance.

Appointment of Counsel.

Where the record on appeal did not show that the defendant requested or desired an attorney to be appointed by the court representing him on the trial, there was no error. Bellew v. State, 363.

Approval by Judge.

The law provides that the statement of facts must be signed and approved by the trial judge, and he is not required to approve a statement of facts, if he does not deem the same correct. Art. 824, Code Criminal Procedure. Simpson v. State, 376.

Argument of Counsel. See Allusion to Defendant's Failure to Testify; Theft, 8.

1. Where the remarks of State's counsel were not of that nature that would call for a reversal, and the jury were orally instructed not to consider the same, there was no reversible error. Byrd v. State, 35.
2. In the absence of a bill of exceptions, complaints to remarks of counsel and reading law to the court cannot be reviewed. Cloud v. State, 76.
3. Where, upon appeal from a conviction of murder in the second degree, it appeared that the argument of State's counsel was made in response to that of appellant's counsel, and the court withdrew said remarks from the jury, there was no error. Maxwell v. State, 248.
4. Where the bills of exception did not point out the error and no written charges were requested to the argument of State's counsel, there was no error. Following Clayton v. State, recently decided. Walls v. State, 317.
5. Where the bill of exceptions did not point out the error in the argument of State'e counsel, and no written charge was requested, there was no error. Following Clayton v. State, 67 Texas Crim. Rep., 311. Chafino v. State, 393.
6. Where the argument of State's counsel was not shown in the bill of exceptions to have been harmful to such an extent as to have been reversible error, there was no error, although the remark of counsel that the jury could presume something which had not foundation in the evidence was improper. Davis v. State, 420.
7. In the absence of a bill of exception pointing out the error in the argument of State's counsel and a written charge withdrawing same, there was no error. Ellis v. State, 468.
8. Where the criticisms of the argument of counsel in the light of the qualifications by the court were untenable, there was no error. Condron v. State, 513.
9. Where, upon trial of assault to rape, the court charged the jury to disregard the remarks of State's counsel, which were improper, but not of sufficient importance to cause a reversal, there was no error. Fuller v. State, 534.
10. In the absence of a bill of exceptions or a requested charge, complaints as to arguments of counsel cannot be considered on appeal. Bogue v. State, 656.

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Arrest. See Confessions; Aggravated Assault, 10.

Where the evidence showed that what was said and done between defendant and the officer resulted in the recovery of the stolen property, there was no error under Article 810, Code Criminal Procedure, although defendant was under arrest at the time. Lane v. State, 65.

Article 743, Code Criminal Procedure.

1. Where, upon trial of murder, the charge of the court properly embraced every matter raised by the evidence, and there were no errors of omission or commission in the charge which could result in injury to defendant, there was no error on this ground, under Article 743, Code Crim. Proc. Powdrill v. State, 340.

2. Where, upon trial of theft of a horse as an accomplice, the testimony of another offense was introduced by an accomplice thereto without objection, and the appellant for the first time raised the question of the court's failure to charge on said accomplice testimony in his amended motion, and there being no injury shown to the rights of defendant, there was no error under Article 743, Code Criminal Procedure. Bailey v. State, 474.

Assault to Murder.

1. Where, upon trial of assault with intent to murder, the evidence sustained the conviction, there was no error. Rhodes v. State, 45.

2. Where, upon trial of assault with intent to murder and a conviction of aggravated assault, the evidence was sufficient to sustain the conviction, there was no error. Robinson v. State, 87.

Assault to Rape. See Indictment, 6; Outcry.

1. Where, upon trial of assault with intent to rape, the evidence sustained the conviction and the court submitted the defendant's alibi, the conviction was sustained. Davis v. State, 86.

2. Where, upon trial of assault with intent to rape, the State's testimony sustained the verdict, there was no error, although there was a conflict of testimony; this is a question of fact for the jury. Rogers v. State, 90.

3. Where, upon trial of assault to rape, the evidence was sufficient to sustain the conviction, and the court fully instructed the jury on the issue of alibi raised by the evidence and submitted defendant's special instructions on specific intent to rape, there was no error in refusing other special charges on the same subject, and the contention that prosecutrix was a woman of loose virtue was no defense, and there was no error. Taft v. State, 528.

Assault to Rob. See Penalty.

1. Where, upon trial of assault with intent to rob, the State's evidence, sustained the conviction, there was no error, although defendant attempted to show an alibi which the court properly submitted to the jury. Wingate v. State, 234.

2. Where, upon trial of assault with intent to rob, the evidence was sufficient to support the conviction, although defendant's alibi was strongly supported by evidence for the defense, there was no error. Chafino v. State, 393.

Assignments of Error. See Practice on Appeal, 7.

1. Assignments of error filed four months subsequent to the adjournment of the trial court cannot be considered; but if considered, there was no error. Following Wilson v. State, 52 Texas Rep., 173, and other cases. Martinez v. State, 280.

2. This court cannot consider questions raised by assignment of errors like in the civil courts, but is restricted to questions raised by bills of exception or motion for new trial. Skinner v. State, 488.

Attempt at Burglary.

Where, upon a trial of an attempt to commit burglary, the evidence showed that the steps taken by defendant had gone beyond a mere preparation, and the only step remaining would have been to have committed the completed offense, the conviction was sustained. Peters v. State, 403.

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Attempt to Rape.

Where, upon trial of assault to rape, the evidence did not raise the issue of an attempt to rape, there was no error in refusing a special charge thereon. Taff v. State, 528.

Attorney. See Contempt.

Attorney and Client.

1. Affidavits attached to the motion for new trial which were taken and sworn to by appellant's counsel as notary public cannot be considered on appeal. Following Maples v. State, 60 Texas Crim. Rep., 169. Horton v. State, 89.

2. Where, upon appeal from a conviction of murder, the defendant claimed newly discovered evidence, but the affidavit of appellant was made before his counsel, the same could not be considered; besides, the alleged testimony could not have produced a different result. Following Maples v. State, 60 Texas Crim. Rep., 169. Peters v. State, 561.

Bail. See Denial of Bail; Jurisdiction, 3.

Bail Bond.

Under Articles 322 and 330, Revised Code Criminal Procedure, a surety on a bail bond or recognizance on appeal has a right to surrender his principal and be released from liability on the undertaking; and the provisions of the code in regard to release of sureties on bail apply as well to bonds given before as after conviction. Overruling Talley v. State, 44 Texas Crim. Rep., 162. Ex Parte Cobb, 473.

Bailment. See Venue, 4.

Where defendant was charged with theft of mules under bailment and contended that he had not sold the mules, but left them in charge of another for the owner, and this issue was fairly submitted to the jury who found adversely to defendant, there was no error. Peck v. State, 490.

Bastard. See Former Marriage.

Beer.

1. A charge of the court that beer is an intoxicating liquor as a matter of law is proper. Following Moreno v. State, 64 Texas Crim. Rep., 660, 143 S. W. Rep., 156. Misher v. State, 223.

2. In the absence of proof on the subject as to whether beer was intoxicating or non-intoxicating, the court judicially knows and determines that beer is an intoxicant. Following Moreno v. State, 64 Texas Crim. Rep., 660, and other cases. Davidson, Presiding Judge, dissenting. Todd v. State, 610.

Bias of Witness.

It is always permissible to prove the bias and prejudice of any witness by himself, and if he denies by another. Green v. State, 485.

Bill of Exceptions. See Argument of Counsel; Change of Venue, 4; Continuance; Cross-examination, 1; Evidence; Filing; Judgment of Conviction; Jury and Jury Law; Leading Questions; Misdemeanor; Motion for New Trial; Motion to Strike Out; Ninety Days Limit; Res Gestae, 7; Theft of Cattle, 3; Venue, 5; Withdrawal of Plea.

1. In the absence of a bill of exceptions to the reproduction of testimony of a witness living beyond the State, the matter cannot be considered, however, if properly presented, the testimony was admissible, a proper predicate having been laid. Pace v. State, 27.

2. Where the objections to the court's charge was that the court erred in charging the jury as follows, and then set out the paragraph of the charge without pointing out the error complained of, the same cannot be considered on appeal. Byrd v. State, 35.

3. Where the bill of exceptions does not disclose what answer, if any, the witness made to the question, the matter cannot be reviewed on appeal. Following Tweedle v. State, 29 Texas Crim. App., 586. Johnson v. State, 107.

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Bill of Exceptions—Continued.

4. Where the bill of exceptions failed to show what answer the defendant had reason to believe the witness would have given, the same could not be considered on appeal. Following May v. State, 25 Texas Crim. App., 114, and other cases. Fletcher v. State, 135.

5. Where defendant's bill of exceptions did not point out the error as to the admission of testimony concerning the identification of defendant, the same cannot be considered on appeal; besides, such identification at the police station was an established fact. Wingate v. State, 234.

6. Where the bill of exceptions is not approved by the trial judge, the same cannot be considered on appeal. Stewart v. State, 337.

7. Where the bill of exceptions showed that defendant's objection to a certain question was sustained, there is no room for complaint. Nesbitt v. State, 374.

8. Where the court refused to approve a part of the bill of exceptions and defendant accepts the same and does not resort to a bill by bystanders, the bill of exceptions, as presented in the record, will be considered on appeal. Following Blain v. State, 34 Texas Crim. Rep., 448. Simpson v. State, 376.

9. Where the bills of exception were not presented and approved and filed within the time allowed by law, the same cannot be considered on appeal, and only objections to the charge complained of in the motion for new trial can be reviewed. Serop v. State, 399.

10. Where the bill of exceptions did not show that any answer was given to the question which was objected to as leading, there was nothing to review. Following Carter v. State, 59 Texas Crim. Rep., 73. Ellis v. State, 468.

11. Where the record contained no evidence of the allegation that defendant was induced to plead guilty and the matter was not properly verified by bills of exception, the same could not be considered on appeal. Price v. State, 492.

12. In the absence of bills of exception, the court's ruling on testimony cannot be considered on appeal. McDowell v. State, 545.

13. Where the bills of exception were not filed within time, but this court, nevertheless, considered them that there might not be any complaint, there was no reversible error. Perry v. State, 644.

Bloody Clothing.

Where the location of the wound was not disputed and that the defendant did the cutting, the court should not have permitted in evidence, the bloody coat which the injured party wore at the time he was cut and permit prosecuting counsel to comment thereon. Corley v. State, 626.

Books.

In a prosecution for unlawfully engaging in the business of selling intoxicating liquors in local option territory, the books of the express company having been properly proven up and the entries shown to have been correctly made and defendant's receipt therein shown, were properly admissible in evidence. Following Stephens v. State, 63 Texas Crim. Rep., 382. Wilson v. State, 567.

Breaking. See Burglary, 3.

Bribing Witness. See Indictment, 7.

Where, upon trial of bribing a witness, the defendant showed in his application for postponement that he had been convicted as an accessory upon the identical facts for which he was being tried, and that he had appealed from said conviction, and therefore asked for a postponement until the other case was finally disposed of, so that he might plead former acquittal or conviction, the same should have been granted. Following Maines v. State, 37 State Crim. Rep., 617, and other cases. Harrison v. State, 152.

Burden of Proof. See Presumption, 1.

Where the court's charge on manslaughter in connection with his charge on murder properly applied the doctrine of reasonable doubt, the contention

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Burden of Proof—Continued.
that the court's charge placed the burden on defendant is untenable. Distinguishing Huddleston v. State, 54 Texas Crim. Rep., 93. Hendricks v. State, 209.

Burden on State, When.

Where defendant was charged with murder, and the judgment of the County Court adjudging defendant insane, and that he had been insane for a time reaching over the date of the homicide, was introduced in evidence, it was reversible error to charge the jury that they could not be bound by said judgment, as it was found after the alleged shooting, and that it rested upon the defendant to show that he was insane at the very time of the homicide; but the burden was on the State to show the sanity of the accused at the time of the alleged offense, in the face of the judgment from the County Court finding him insane. Witty v. State, 125.

Burglary. See Daytime Burglary; Evidence; Indictment; Private Residence; Want of Consent.

1. Where, upon trial of burglary, the refused requested charges were covered by the main charge of the court, there was no error. Alsup v. State, 117.

2. Where, upon trial of burglary of a railway car, the evidence was insufficient to sustain a conviction, the judgment is reversed and the cause remanded. Oliver v. State, 263.

3. Under Article 1308, Penal Code, the unlocking and opening of a locked door and an entry thus effected, where the intent to steal is shown, or an actual theft is shown, this would be a breaking under the law, even though the burglar, after thus effecting an entry and committing the theft, in leaving should again close and lock the door and leave it in exactly the same condition as before he entered, and where such a state of facts were shown, the same was sufficient to sustain a conviction for burglary. Hollis v. State, 286.

4. Where, upon trial of burglary in the night-time, the evidence sustained the conviction, there was no reversible error. Bellew v. State, 363.

5. Where, upon trial of burglary, the evidence was sufficient to sustain a conviction, there was no error. Stephens v. State, 379.

6. Where, upon trial of burglary by the unlawful discharge of firearms into the house of another with intent to injure the inmates, the evidence sustained the conviction, there was no error. Gardington v. State, 595.

7. Where, upon trial of burglary, the evidence, although conflicting, sustained the conviction, there was no error. Clark v. State, 642.

Carrying Pistol. See Evidence, 1, 6; Ignorance of Law.

1. Where, upon trial of unlawfully carrying a pistol, the evidence showed that the defendant carried the pistol on and about his person at different public gatherings, saying that he wanted the party who gave it to him to redeem it; and that he was found with the pistol, having all the different parts of it in his pocket, there was no error in the court's refusal of a special charge to acquit the defendant if he did not intend to violate the law, and if he took the pistol apart. Crain v. S., 55.

2. Where, upon trial of unlawfully carrying a pistol, the evidence sustained the conviction, there was no error. Valigura v. State, 320.

3. Where appellant carried the pistol in the bottom of a buggy on his way home, and then left the road and took the pistol out of the buggy and discharged it several times and then returned it to the bottom of the buggy, there was no error in refusing a requested charge that under such a state of facts, the defendant should be acquitted, although the court's main charge may have to some extent been on the weight of the evidence. Following Hill v. State, 50 Texas Crim. Rep., 619, and other cases. DeFriend v. State, 329.

4. Where, upon trial of unlawfully carrying a pistol, the evidence failed to show that the offense had been committed before the making of the complaint and information and filing thereof, the conviction could not be sustained. Graso v. State, 633.

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135. Sue v. State, 52 Texas Crim. Rep., 122..........282, 386, 458, 472, 548
136. Sweeney v. State, 65 Texas Crim. Rep., 593........................ 486
137. Thomas v. State, 1 Texas Crim. App., 289........................ 357
138. Thompson v. State, 37 Texas Crim. Rep., 227........................ 135
139. Thornley v. State, 36 Texas Crim. Rep., 118........................ 479
140. Thuston v. State, 18 Texas Crim. App., 26........................ 441
141. Tippett v. State, 37 Texas Crim. Rep., 186........................ 171
142. Treadway v. State, 65 Texas Crim. Rep., 208........................ 350
143. Trevenio v. State, 48 Texas Crim. Rep., 207....................14, 351
144. Tubb v. State, 55 Texas Crim. Rep., 606........................ 298
145. Tucker v. State, 58 Texas Crim. Rep., 271........................ 364
146. Tweedle v. State, 29 Texas Crim. Rep., 586........................ 109
147. Usher v. State, 47 Texas Crim. Rep., 93........................ 87
148. Wagner v. State, 53 Texas Crim. Rep., 306..............339, 484, 602
149. Wilkins v. State, 35 Texas Crim. Rep., 529........................ 104
150. Williams v. State, 52 Texas Crim. Rep., 371....................162, 390
151. Wilson v. State, 52 Texas Crim. Rep., 173........................ 283
152. Wright v. State, 37 Texas Crim. App., 146........................ 379
153. Yarbrough v. State, 19 Texas, 162........................ 555

Cases Overruled. See Cases Cited.
1. Talley v. State, 44 Texas Crim. Rep., 162........................ 474
2. Wilcek v. State, 141 S. W. Rep., 88..............449, 453, 454

Cases Qualified. See Cases Cited.
1. Caylor v. State, 44 Texas Crim. Rep., 118........................ 302
2. Chenault v. State, 46 Texas Crim. Rep., 351........................ 302
3. Chitister v. State, 33 Texas Crim. Rep., 635........................ 302
4. Bent v. State, 43 Texas Crim. Rep., 126........................ 302
5. Gann v. State, 42 Texas Crim. Rep., 133....................293, 302
6. Hargrove v. State, 63 Texas Crim. Rep., 143........................ 302
7. Hunnicutt v. State, 20 Texas Crim. App., 632........................ 361
8. Miller v. State, 72 S. W. Rep., 996........................ 302
9. Ripley v. State, 58 Texas Crim. Rep., 485........................4, 21
10. Shaekey v. State, 41 Texas Crim. Rep., 255........................ 302
11. Thompson v. State, 30 Texas Crim. App., 325........................ 361

Challenge. See Jury and Jury Law; Opinion of Juror.

Where, upon trial of theft from the person, nine jurors had been accepted by both sides but had not been sworn as jurors, and were then permitted to separate during the noon recess of the court, and it was shown that they had not had any communication with anyone about the case or that they were not fair, competent and impartial jurors, there was no error in overruling defendant's motion to set aside the jurors. Davidson, Presiding Judge, dissenting. Jones v. State, 447.

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Change of Venue. See Appeal Pending; District Court, 1; District Judge, 1.

1. Under the law as it now stands, a special term of the District Court can be convened for the purpose of entering any order that could be entered at a regular term thereof, and no notice or publication thereof is now required by law. See opinion for discussion of the history of the legislation on this subject. Mayhew v. State, 187.

2. Where the record on appeal showed that the District Judge who changed the venue on his own motion was familiar with all the facts and conditions surrounding the case, and under the sanction of his official oath reached the conclusion that a trial alike fair and impartial to the State and to the defendant could not be had in the county of the prosecution, his action in changing the venue of the case was not arbitrary, although witnesses were introduced who testified that a fair trial could be had. Id.

3. In the absence of an application made to change the venue, and nothing in the record to disclose any reason therefor, there was no error. Martinez v. State, 280.

4. In the absence of a bill of exceptions to the overruling of an application for change of venue, the same can not be reviewed on appeal, under Article 634, Code Criminal Procedure. Creed v. State, 464.

Character of Deceased.

When self-defense is an issue, and it is necessary to show the state of mind of defendant at the time of the commission of the homicide, specific acts of violence of the deceased which are then known to defendant and which show or tend to show that deceased was a violent and dangerous man may be introduced in evidence on the issue of self-defense; however, where such specific acts are not known to defendant prior to the homicide, general reputation alone is admissible. Hysaw v. State, 562.

Charge of Court. See Accomplice; Accommodation; Adequate Cause; Agency; Aggravated Assault, 6, 8; Alibi; Article 743; Assault to Rape, 3; Assault to Rob, 1; Attempt to Rape; Bailment; Beer; Bill of Exceptions; Burden of Proof; Burden on State; Burglary; Carrying Pistol; Circumstantial Evidence; City Charter and Ordinance, 2; Communicated Threats; Confessions; Converse Proposition; Date of Offense; Date of Sale; Deadly Weapon; Declarations and Acts of Defendant; Defendant as a Witness, 1; Defense Theories; Druggist; Duress; Entry; Explanation; Fraudulent Intent; General Objections; Harmless Error, 1; Impeaching Testimony; Impeaching Witness, 1; Imputing Crime to Another; Independent Impulse; Insanity; Insult to Female Relative; Intent; Invited Error; Joint Defendant; Juxtaposition; Law in Force; Limitation, 3; Limiting Testimony; Lucid Intervals, 2; Manslaughter; Misdemeanor; More than One Assailant; Murder; Murder in First Degree; Necessary Force; Negligent Homicide; Number of Sales; Occupation; Officer's Right to Arrest; Original Taking; Other Offenses, 3; Other Transactions; Partnership; Peremptory Charge to Acquit; Practice on Appeal; Presumption; Presumption of Innocence; Principals; Provocation; Provoking Difficulty; Pursuing Occupation; Reasonable Doubt; Recalling Jury; Recent Possession; Receiving Stolen Property; Requested Charges; Res Gestae Statements; Rule Stated, 7; Sale; Self-defense; Separate Offense; Simple Assault; Specific Intent to Rob; Statement of Facts; Subterfuge; Sufficiency of Evidence; Sunday Law; Theft; Theft of Cattle; Theft of Horse; Threats; Uncommunicated Threats; Unrecorded Brand; Value, 1; Venue, 3, 4; Verdict by Lot, 4; Voluntary Use of Intoxicants; Weight of Evidence; Words and Phrases, 4.

1. Where it was not certain as to whether a State's witness was an accomplice, the court properly submitted the issue to the jury. Following Pace v. State, 58 Texas Crim. Rep., 90. Pace v. State, 27.

2. Where the criticisms to the court's charge were hypercritical and too general, they need not be considered, and there was no error in the refusal of requested charges which were not applicable to the facts. Polk v. State, 53.

3. Where, upon trial of theft, the court's charge required the jury in order to convict defendant that he fraudulently took the property and converted it to his own use in the county of the prosecution, a complaint as to the court's charge on venue was not well taken. Lane v. State, 65.

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Charge of Court—Continued.

4. While it would be better practice for the court to inform the jury, when he gives a charge on circumstantial evidence, yet it is not necessary to do so, where the court, in fact, charges on such evidence. Flagg v. State, 107.

5. Where, upon trial of murder and a conviction of manslaughter, there was no testimony that the knife used by the defendant was a deadly weapon, and it was not conclusively shown that defendant intended to kill deceased, the court should have submitted the issue of aggravated assault, and the failure to do so was reversible error. Blackshear v. State, 113.

6. Where, upon trial of adultery, the requested charges which were refused were substantially covered by the court's main charge, there was no error. Brown v. State, 138.

7. Where the court's charge on murder in the second degree was in full compliance with approved precedent and also charged fully on manslaughter and defined adequate cause, it was not necessary to do so again in the charge on murder in the second degree. Following Best v. State, 58 Texas Crim. Rep., 327. Hendricks v. State, 209.

8. Where, upon trial of burglary in the daytime, the court fully charged the law as applicable to the facts and also submitted the requested charges which were in point, and the evidence amply supported the conviction, there was no error. Hollis v. State, 286.

9. Where, upon trial of theft of a horse, the defendant pleaded insanity and that he was insane from childhood, and the court properly charged the jury on the question of insanity at the time of the commission of the offense, there was no error in the court's failure to charge specifically on the issue of defendant's insanity at the time of the trial, no affidavit being filed or motion made to submit such issue. Lester v. State, 426.

10. Where a State's witness had failed to identify the defendant except in a very indefinite way, and the State laid a predicate to impeach him and introduced another witness who testified that the first witness had identified the defendant, the court's failure to limit said testimony to purposes of impeachment was reversible error. Following Dusek v. State, 48 Texas Crim. Rep., 519, and other cases. Jones v. State, 497.

11. Where, upon trial of murder, the defendant criticised the court's charge on manslaughter, claiming in one instance that it took away from the defendant the benefit of a reasonable doubt, and in another that it authorized the jury to convict on a preponderance of the evidence; but when the charge, read as a whole, did neither of these things, there was no reversible error. Condron v. State, 513.

12. Where, upon trial of unlawfully pursuing the occupation of selling intoxicating liquors in local option territory, the court's charge, when taken as a whole, correctly charged the law under which defendant was being prosecuted, and the same could not have misled the jury to believe that two sales of intoxicating liquors would establish the offense, there was no reversible error. Wilson v. State, 567.

13. Where the court's main charge, and the requested charges submitted, presented every phase of the law applicable to the evidence, there was no error in refusing further requested charges. Broadnax v. State, 617.

Check. See Circumstantial Evidence, 1; Embezzlement.

Circumstantial Evidence. See Adultery; Alibi, 1; Charge of Court, 4; Juxtaposition; Rule Stated, 3.

1. Upon trial of forgery, there was no error in introducing in evidence, as a circumstance, that the party whose name was alleged to be forged had given defendant another check upon the same bank, to trace knowledge to the defendant that the said party did his banking business with said bank. Following Noftsinger v. State, 7 Texas Crim. App., 301, and other cases. Whorton v. State, 1.

2. Where, upon trial of murder, the case being one of circumstantial evidence, and defendant claimed an alibi, the court properly submitted these issues in a proper charge; no exact words being necessary in charging on circumstantial evidence, and the failure to use the words, "and none other," was not material. Following Henderson v. State, 50 Texas Crim. Rep., 266. Boseley v. State, 100.

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Circumstantial Evidence—Continued.

3. It is only when the case is proven by circumstantial evidence alone that a charge on circumstantial evidence is required. Meadows v. State, 116.

4. Suspicious circumstances alone are not sufficient upon which to base a conviction; the circumstances must unerringly point out the defendant as the guilty person when circumstantial evidence is relied upon. Following Hogan v. State, 13 Texas Crim. App., 319, and other cases. Yarbrough v. State, 150.

5. Where, upon trial of theft of money over the value of $50, the evidence was circumstantial and the court, in his charge, properly applied the law to the facts of the case and gave a proper charge on circumstantial evidence, there was no error. Following Mosely v. State, 59 Texas Crim. Rep., 90, and other cases. Manley v. State, 169.

6. Where, upon trial of theft of cattle, the court's charge on circumstantial evidence followed approved precedent, there was no errdr. Following Barr v. State, 10 Texas Crim. App., 507, and other cases. Powers v. State, 214.

7. Where, upon trial of robbery, the evidence was not entirely circumstantial, but positive in its character, there was no error in the court's failure to charge thereon. Serop v. State, 399.

8. Where, upon trial of theft of a horse, the evidence was entirely circumstantial, there was no error in admitting testimony that the witness met a man riding a horse and leading another within a few hundred yards of the alleged owner's home after sundown; besides, the bill of exceptions was defective in not pointing out the alleged error. Lester v. State, 426.

9. It is only when the evidence is wholly circumstantial that a charge on that character of evidence is required, and where defendant was positively identified, there was no error in the court's failure to charge on circumstantial evidence. Gardington v. State, 595.

10. Where, upon trial of theft of a hog, the evidence was circumstantial, the court should have submitted a proper charge thereon. Matthews v. State, 639.

11. Where there was positive evidence, there was no error in the court's failure to charge on circumstantial evidence. Clark v. State, 642.

12. Where the evidence was positive, there was no error in the court's failure to charge on circumstantial evidence. Perry v. State, 644.

City Charter and Ordinance.

1. A hog is that character of animal that his keeping may be absolutely prohibited in the thickly inhabited portions of a city, and where the ordinance restricted the keeping of hogs in the City of Gonzales to certain limits, describing the metes and bounds in which hogs could not be kept, which covered about one-half the corporate limits of the city, the same was a valid ordinance and a conviction of relator for a violation thereof in the Corporation Court will not be set aside on writ of habeas corpus. Following Ex parte King, 52 Texas Crim. Rep., 383, and other cases. Ex Parte Botts, 161.

2. Upon trial of keeping a disorderly house for purposes of prostitution, there was no error in the court's charge that a city was not authorized to set apart and designate any part of said city for the purpose of permitting prostitution. Clyman v. State, 638.

Clothes of Deceased.

Where, upon trial of murder, the clothes of deceased were introduced in evidence to illustrate a point in the case, there was no error. Peters v. State, 561.

Co-Conspirator. See Declaration and Acts of Conspirator.

The acts and declarations of co-conspirators prior to the consummation of the completed act are all admissible in evidence both to show the conspiracy and the animus behind the act. Wilson v. State, 432.

Codefendant.

1. Where the State's witnesses testified that defendant and his codefendant were always together when they were in possession of the alleged stolen property taken from the burglarized house and when defendant made

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Codefendant—Continued.
admissions of his guilt, and said codefendant was acquitted after defendant was convicted, and it appeared in the motion for new trial that the codefendant would testify that all of these statements of the State's witnesses were false, a new trial should have been granted. Clark v. State, 642.

2. Until a party is indicted, he is not rendered incompetent to testify in behalf of a codefendant, and where the court excluded such testimony, the same was reversible error. Following Scroggin v. State, 30 Texas Crim. App., 92, and other cases. Ponder v. State, 654.

Codification.
The Legislature did not confer on the codifiers power or authority to enact or repeal any law under the Act of 1909, and when the codifiers brought forward the Act of 1903 and omitted the Act of 1899, said latter Act was not thereby repealed. Berry v. State, 602.

Collateral Offense. See Accomplice, 7.

Comment on Testimony. See Remarks by Judge.

Communicated Threats.
Where, upon trial of murder, the evidence clearly established that the threats by deceased and communicated to the defendant were in fact made, there was no error in the court's charge in failing to instruct the jury that the defendant could act upon such threats, whether they were made or not; the defendant not asking any charge thereon. Salmon v. S., 506.

Common Law. See Eyewitness.

Comparison of Handwriting.
Upon trial of forgery, there was no error in admitting in evidence certain letters found upon defendant which were in the handwriting of the defendant, as standards of comparison with the writing in the forged check. Following Hughes v. State, 59 Texas Crim. Rep., 294, and other cases. Whorton v. State, 1.

Complaint. See Information, 2, 5.

Conclusion of Witness.
Where, upon trial of assault to murder, the defendant endeavored to introduce in evidence the conclusion of the main State's witness to the effect that she believed defendant did not aim to hurt her, there was no error in excluding same. Rhodes v. State, 45.

Conduct of Defendant. See Declarations and Acts of Defendant.

Conduct of District Attorney. See Remarks by Judge, 3.

1. The district attorney should not ask injurious and hurtful questions if he in fact knows there exists no foundation therefor, and unless he believes he can establish his point by legitimate evidence. Clements v. State, 369.

2. Where the conduct of the witness justified the conduct of the district attorney in cross-examining him, there was no error and the latter had the right to discuss this testimony. Hysaw v. State, 562.

3. Where the district attorney, in examining the jurors before they were empanneled, stated to them that the law now makes it a felony to engage in the occupation of selling intoxicating liquors in local option territory and asked them whether they believed it was a good law, etc., which they answered in the affirmative, there was no reversible error. Wilson v. State, 567.

Confession. See Exculpatory Statement; Impeaching Witness, 1.

1. Where the exculpatory statement was that defendant had not been in the place at the time the alleged offense was committed, the same was not a confession required to be in writing when defendant was under arrest; besides, the facts showed that he did not know he was under arrest, and that he

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Confession—Continued.
afterwards made a written statement which complied with the statutes as to confessions under arrest which was the same in substance as his exculpatory oral statement, and there was no error. Following Martin v. State, 57 Texas Crim. Rep., 264, and other cases. Davidson, Presiding Judge, dissenting. Whorton v. State, 1.

2. Where the statement or confession contained both inculpatory and exculpatory matter, but the State did not rely solely upon the same and introduced other inculpatory evidence, there was no error in the court's failure to charge the jury that the State was bound by such statement or confession unless it was shown to be false. Following Slade v. State, 29 Texas Crim. App., 381. Loan v. State, 221.

3. Where, upon trial of assault with intent to rob, defendant introduced as a witness one of his alleged companions who was shown to have been with him at the time, for the purpose of proving an alibi, there was no error in permitting the State to introduce the confessions of said witness, which completely proved the fact of the attempted robbery by the defendant; the court properly limiting such testimony to the purpose of impeachment. Wingate v. State, 234.

Congregation. See Religious Worship.

Conspiracy. See Co-conspirator; Principals, 6; Rule Stated, 6.

1. Where, upon trial of accessory after the fact to the crime of seduction, it was shown that defendant and others acted together in spiriting away a witness for the State by paying him money to leave the county of the prosecution, there was no error in admitting testimony as to the effort which the co-conspirator made to secure said money, the defendant's connection therewith being substantially shown; besides, the bill of exceptions was defective. Harrison v. State, 291.

2. Upon trial of assault to murder, there was no error in admitting testimony as to tracks surrounding the scene of the assault, which tended to show that defendant and his brothers were lying in wait for the deceased. Wilson v. State, 432.

3. Where, upon trial of murder, the evidence showed that the brother of defendant and the latter were acting together at the time of the commission of the homicide, there was no error in admitting the declarations of said brother when asked about the trouble between defendant and deceased that it was not going to leak out from them, but that it might leak out after a while, and which was made a few days before the killing in the absence of defendant; the court properly limiting this testimony to a conspiracy; besides, the ill-will of defendant towards the deceased was amply shown by other testimony. Cameron v. State, 439.

Consent. See Jurisdiction by Consent.

Constitutional Law. See Jurisdiction, 7; Special Judge.

The medical practice Act is constitutional, and does not seek to regulate how anyone may treat disease or disorders, but simply provides that before he does so, he shall demonstrate that he is well grounded in certain studies named in the Act; and no one has an inalienable right to practice medicine or treat disease for pay. Following Newman v. State, 58 Texas Crim. Rep., 223, and other cases. Lewis v. State, 593.

Contempt.

Where the cause is reversed and remanded on other grounds, it is not necessary to consider the complaint to the action of the court in imposing a fine on defendant's attorney. Hysaw v. State, 562.

Contest. See Law in Force, 3.

Continuance. See Discretion of Court, 1; Second Application; Want of Diligence.

1. Where defendant's second application for continuance did not state the witnesses were not absent by the procurement and consent of the defend-

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Continuance—Continued.
ant, and the same showed a want of diligence, there was no error in overruling same. Pace v. State, 27.

2. Where the motion for continuance was oral and alleged that defendant's attorney was temporarily absent, there was no error in the court's action in overruling same. Following Usher v. State, 47 Texas Crim. Rep., 93. Davis v. State, 86.

3. Where defendant's application for continuance showed a total want of diligence, there was no error in overruling same. Horton v. State, 89.

4. Where another witness testified to the same facts that were expected to be proved by the absent witness, there was no error in overruling the motion. Following Harvey v. State, 35 Texas Crim. Rep., 545. Boseley v. State, 100.

5. Where the application for continuance showed a want of diligence, and that the absent testimony was not probably true, there was no error in overruling same. Meadows v. State, 116.

6. Where defendant knew that the absent witnesses were not in the county of the prosecution at the time process was issued, this will not be diligence, although such absence may have been temporary; besides, the absent testimony was of an impeaching character, and the application also showed that one of the witnesses was absent by the consent of the defendant, and there being no abuse of discretion shown in overruling the motion for continuance, there was no error. Fletcher v. State, 135.

7. Where defendant was tried as an accomplice for arson, and the State claimed by the witness who burned the house that the defendant employed said witness to do the burning and the agreement was made at a certain time and place, and defendant's motion for continuance alleged that he expected to show by the absent witness that at said time and place the witness was present and that no such agreement was made between the parties, the continuance should have been granted. Baggett v. State, 145.

8. Where defendant's application for continuance showed, in connection with the record on appeal, that the alleged absent testimony was not probably true and was of an impeaching character, there was no error in overruling the motion. Following Bolton v. State, 43 S. W. Rep., 1010. Pierce v. State, 175.

9. Where the court overruled the application for continuance which clearly showed a lack of diligence, there was no error. Lucas v. State, 269.

10. Where defendant's first application for continuance showed due diligence and material testimony for his defense, the same should have been granted. LaFell v. State, 307.

11. Where defendant's motion for continuance showed a want of diligence, and did not state that the absent testimony could not be procured from any other source, there was no error in overruling same. Walls v. State, 317.

12. Where, upon trial of burglary, it appeared from the record on appeal that the defendant exercised no diligence in procuring the absent testimony or in employing counsel, and said testimony was probably not true, there was no error in overruling the motion for continuance and postponement. Ragland v. State, 372.

13. Where the witness had moved out of the county of the prosecution and no additional process had been issued, the diligence was insufficient. Nesbitt v. State, 374.

14. Where the application for continuance did not show proper diligence, and the absent testimony was of an impeaching character, there was no error in overruling same. Following Butts v. State, 35 Texas Crim. Rep., 364. Caples v. State, 394.

15. Where defendant's application for continuance showed a want of diligence for applying for proper process, and that it was hardly possible that the alleged witness could have been procured by further postponement of the case, there was no error in overruling the motion. Stephens v. State, 437.

16. Where, upon trial of theft from the person, the application for continuance showed a want of diligence and that the alleged absent testimony was probably not true, there was no error in overruling the motion. Following Giles v. State, 66 Texas Crim. Rep., 638. Jones v. State, 447.

17. Where defendant's application for continuance stated no fact that he expected to prove by the absent witnesses which could or would have been a defense to the offense charged, there was no error in overruling the motion for continuance. Spicer v. State, 459.

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Continuance—Continued.

18. In the absence of bills of exception to the overruling of an application for continuance and the admissibility of testimony, the same can not be reviewed on appeal. Creed v. State, 464.

19. Where defendant's fourth application for a continuance showed that some of the alleged absent witnesses appeared and testified; that the diligence as to others was insufficient, and those, where due diligence had been used, could only testify to cumulative facts, there was no error in overruling same. Manley v. State, 502.

20. Where it appeared on motion for new trial that the testimony of the alleged absent witness, to the effect that defendant would be welcome at the house of prosecutrix, would not extenuate or justify a subsequent course of defendant in using force upon the prosecutrix by a violent assault and threats, there was no error in overruling the motion for continuance and new trial. Fuller v. State, 534.

21. Where the alleged absent testimony was contrary to the testimony of other eyewitnesses to the transaction, and others who were in attendance at court and could have testified thereto were not introduced, there was no error in overruling the motion for continuance; besides, some of the testimony was entirely immaterial. McKelvey v. State, 538.

22. Where the alleged absent testimony was immaterial, there was no error in overruling a motion for continuance. McDowell v. State, 545.

23. In the absence of a bill of exceptions to the action of the court in overruling a motion for a continuance, the same can not be reviewed on appeal. Irby v. State, 619.

24. Where it was a serious question whether defendant invited the injured party out of the house or whether he acted in self-defense, he should have been permitted to procure the witnesses who were present at the difficulty. Corley v. State, 626.

Contradicting Witness. See Confessions, 3; Rule Stated, 2, 4.

1. Where defendant's witness testified on the trial to a different state of facts to which he testified on the examining trial, there was no error in admitting so much of the witness's statement as would show a contradiction. Cloud v. State, 76.

2. Where evidence is introduced to impeach the witness by proof of contradictory statements made to him by others, evidence is competent to show that he had previously made statements agreeing with and corroborating his testimony on trial, even if such evidence is not introduced in regular order. Following Hamilton v. State, 36 Texas Crim. Rep., 372, and other cases. Boseley v. State, 100.

3. Whenever either the State or the defendant seeks to impair the credit of a witness by a line of investigation, it is permissible for the opposite side to show the real facts in order that the jury may determine whether such circumstances do or do not affect his credit. Johnson v. State, 107.

4. Where, upon trial of aggravated assault, the party alleged to have been injured testified that he and the defendant had always been friends and that he did not put any dough containing poison in front of defendant's house and did not poison defendant's chickens therewith, the court should have permitted defendant to show the alleged injured party did all these things, to show the malice of the State's witness. Parish v. State, 254.

5. Where, upon trial of assault to murder, the State was permitted to introduce defendant's applications for continuance, and there was nothing in said applications which would contradict any statement made by defendant while testifying in his own behalf, the same were inadmissible in evidence. Wilson v. State, 432.

Conversation.

Where the State's witness was detailing the conversation with defendant in regard to committing the robbery, there was no error in admitting in evidence a part of the same conversation. Perry v. State, 644.

Converse Proposition. See Principals, 1; Provoking Difficulty, 2.

Where the court charged on the law of principals, and there was evidence that defendant was not present at the original taking, the converse proposition

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Converse Proposition—Continued.
should also have been given to the jury. Following Jackson v. State, 20 Texas Crim. App., 190, and other cases. LaFell v. State, 307.

Convict. See Pardon.

Where the court permitted the defendant on cross-examination of a State's witness for purposes of impeachment to show orally that the witness was convicted and afterwards pardoned, there was no error. Perry v. State, 644.

Cooling Time. See Murder, 9.

Copy of Indictment.

While Article 546, Code Criminal Procedure, provides that defendant shall be entitled to two days after service of copy of indictment to prepare for trial, such right can be waived by the defendant, and where he did so, there was no error in forcing him to trial before that time; besides, it is too late to make this contention after verdict. Following Richardson v. State, 7 Texas Crim. App., 486. Spicer v. State, 459.

Corpus Delicti.

Where, upon trial of murder, the evidence showed that the deceased was killed by violence to her person and that the defendant and no other killed her, the corpus delicti was established and the conviction of murder in the second degree sustained. Lucas v. State, 269.

Correcting Name of Defendant. See Name of Defendant.

Corroboration. See Accomplice; Incest.

Counsel. See Appointment of Counsel.

County Attorney. See Jurisdiction, 6.

County Court. See District Court, 2.

County Map. See Field Notes.

County of Residence. See Jury and Jury Law, 3.

Court of Civil Appeals.

The case of Jowell v. Coffee, 132 S. W. Rep., 886, Court of Civ. App., with reference to requiring thirty days notice of special term of District Court, can have no application as the law now stands, and since the adoption of the Revised Statutes of 1911, expressly repealing Articles 1114-1116, inclusive of the Revised Statutes of 1895, which required notice, etc. Mayhew v. State, 187.

Court Records. See Date of Sale.

Credibility of Witness.

1. Where, upon trial of aggravated assault, the party alleged to have been injured testified that he had not been able to work, etc., and to be out and about for some time after the injury, the court should have permitted the defendant to show that the said party, the day after the difficulty, was around defendant's place armed with a gun, cursing and abusing defendant and daring him to come out and settle the difficulty. Parish v. State, 254.

2. Where, upon trial of seduction, the court properly submitted the law on the facts and instructed the jury that they could consider the subsequent acts of prosecutrix as to her credibility, there was no error. Walls v. State, 317.

3. Where the defendant attacked the credibility of a State's witness by attempting to show that she met defendant clandestinely, there was no error in permitting her to show that defendant claimed to her to be a single man, etc.; besides, if error, it was harmless. Valigura v. State, 320.

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Cross-Examination. See Husband and Wife.

1. Where defendant claimed in his direct examination that he had frequently rendered assistance to the prosecutor, there was no error in cross-examination to ask him where he had ever signed any note for the prosecutor, which he answered in the negative; besides, the bill of exceptions was defective, Nesbitt v. State, 374.

2. In the absence of a bill of exceptions, the court's action in permitting certain questions to be asked of the wife of the deceased on cross-examination cannot be reviewed. Cameron v. State, 439.

3. Where specific acts of violence are introduced in evidence, the State should be permitted, on cross-examination, to go into the particulars of the specific act to rebut defendant's theory that deceased was a dangerous person. Hysaw v. State, 562.

Cumulative Evidence. See Newly Discovered Evidence, 1.

Custody. See Ownership, 2.

Custom.

1. Upon trial of selling intoxicating liquor as an occupation in local option territory, there was no error in the court's refusal to permit defendant to show that it was the custom of patrons of his place of business to have defendant order intoxicating liquors for them. Byrd v. State, 35.

2. Where, upon trial of assault with intent to rob, the prosecuting witness stated that the reason the defendant did not get his money was that the witness had it in his shoe, there was no error in permitting him to testify that this was his custom. Chafino v. State, 393.

Date of Offense. See Carrying Pistol, 4; Gaming, 4; Gaming Law; Indictment, 25; Information, 3; Limitation; Rule Stated, 5.

1. Where the date of the offense was alleged to be fifteen months after the law became effective under which defendant was prosecuted, it was not necessary to allege in the indictment that the offense occurred subsequent to the passage of the law. Byrd v. State, 35.

2. In the absence of a bill of exceptions to the court's charge in a misdemeanor case and requested charges thereon, the same cannot be reviewed. However, where the date of the offense could not have misled the jury under the court's charge, there was no error. Baker v. State, 50.

3. Where defendant objected to the testimony as to the date of the offense because the indictment showed the figures 190 instead of "1911," but the indictment really showed in fact the figures to be "1911," there was no error in overruling the objection. Valigura v. State, 320.

4. Where defendant on trial of embezzlement objected to the introduction in evidence of certain letters because they were written after the date of the offense alleged in the indictment, but the record showed that they were all written prior to the date of the finding and filing of the indictment and were within the period of limitation with reference to the offense, there was no error. Irby v. State, 619.

5. Upon trial of embezzlement, the state was not restricted to its proof of the date of the offense to the identical date alleged in the indictment, as long as the same was within three years prior to the filing of the indictment. Following Knight v. State, 64 Texas Crim. Rep., 541. Id.

6. Where the indictment alleged the date of the offense on or about a certain date, there was no error in admitting testimony that the offense occurred within the period of limitation. Following Cudd v. State, 28 Texas Crim. App., 124, and other cases. Perry v. State, 644.

Date of Sale.

Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the witnesses for the State were unwilling witnesses and could not fix the date of the different sales by the defendant, it was permissible to show by the court record of their former testimony at the examining trial the date of such sales; the court instructing the jury that they must

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Date of Sale—Continued.
acquit defendant if they had a reasonable doubt that he made at least two sales as charged in the indictment to persons named therein, and that he pursued the occupation, etc. Misher v. State, 223.

Daytime Burglary.
Where the indictment was sufficient to charge a burglary either at night or in the daytime, and the evidence showed that it was committed after 4:30 in the morning and before daylight, there was no error in refusing a requested charge to acquit defendant, unless the evidence showed a daytime burglary. Stephens v. State, 379.

Deadly Weapon. See Aggravated Assault, 1, 7; Charge of Court, 5.
1. Where the question of deadly weapon was raised by the evidence, the court should have charged thereon. Blackshear v. State, 113.
2. Where, upon trial of murder and a conviction of manslaughter, the evidence showed that the knife which defendant used was a pocket-knife, carried in his watch pocket and could not have been very large, and there was no description of said knife, and the wound inflicted was in a dangerous locality of the body where it would probably strike an artery, and defendant testified that he did not intend to kill, but used said knife in self-defense, the court should have charged aggravated assault, and the provisions of Art. 1147, Revised Penal Code. Following Connelly v. State, 45 Texas Crim. Rep., 142, and other cases. Jones v. State, 216.
3. Where, upon trial of manslaughter after an acquittal of murder, the evidence showed that there was no proof that the instrument used by the defendant was a deadly weapon, and he testified that he did not intend to kill and there was also testimony that the deceased began the difficulty by an assault upon defendant, the court should have submitted aggravated assault as requested. Green v. State, 485.

Decisions. See Former Decision.

Declarations of Co-Conspirator. See Conspiracy, 3.
Where, upon trial of assault to murder, the evidence showed that on the afternoon of the day of the assault the party injured, on the one side, and the defendant, his brothers, and others on the other side, had a fist fight; that the party injured knocked down one of the defendant's brothers, and that in the evening after this the defendant and his brothers collected at a place near the house where the party injured was; and defendant's companions in the previous fight went to said house and made some threats there against the party injured and finally brought him to the defendant and his brothers, shortly after which the assault occurred, there was no error in admitting all these matters. Wilson v. State, 432.

Declarations and Acts of Deceased. See Ill-Will; Res Gestae, 6.
1. Where the declarations of the deceased occurred long before the homicide, did not amount to a threat against the defendant and had no connection with the difficulty which ended in the loss of deceased's life, there was no error in excluding same. Cloud v. State, 76.
2. Where, upon trial of murder, there was no contest about the fact that hostility and ill-will existed between defendant and deceased for some time before the killing, there was no error in refusing further testimony as to what a witness understood the deceased referred to in a conversation with the witness about a certain street which defendant was to clear and clean up. Salmon v. State, 506.

Declarations and Acts of Defendant. See Fruits of Crime.
1. Where, upon trial of forgery, the court admitted in evidence the exculpatory statement of defendant that he was not in the place where the alleged forged check was passed at the time it was passed or forged, as claimed by the State, and such statement did not contain any inculpatory fact, and the court charged on alibi, there was no error in refusing a special charge that the

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Declarations and Acts of Defendant—Continued.
State was bound by said statement of defendant unless disproved by the evidence. Following Trevenio v. State, 48 Texas Crim. Rep., 207, and other cases. Davidson, Presiding Judge, dissenting. Whorton v. State, 1.

2. Where the declarations of defendant taken together with other testimony were clearly admissible, there was no error. Pace v. State, 5, 27.

3. Upon trial of assault with intent to murder, there was no error in introducing in evidence the declarations of the defendant made before the alleged assault, to the effect that he was going to see his children if he had to wade in blood up to his chin; other testimony showing that he shot the injured party who was his divorced wife when she forbade him to come to see said children. Rhodes v. State, 45.

4. Where defendant was prosecuted for keeping a disorderly house for the sale of intoxicating liquors, etc., there was no error in rejecting testimony by the defense that he kept his doors closed after the complaint was filed against him. Johnson v. State, 107.

5. The acts and conduct of defendant when he was arrested were admissible in evidence, and there was no error in the court's failure to limit the same. Serop v. State, 399.

6. Where, upon trial of burglary, the State introduced in evidence the declarations of the defendant before a justice of the peace as a witness by which he admitted that he sold the alleged stolen property to the party in whose possession it was found, there was no error, it appearing that defendant, at that time, was not under arrest and that no complaint had been filed against him for the offense for which he was being tried. Spicer v. State, 459.

7. Where, upon trial of burglary, defendant's statement as to his possession of the alleged stolen property was properly submitted to the jury, there was no reversible error. Turner v. State, 493.

Declarations and Acts of Third Parties. See Evidence, 2; Res Gestae, 3.

1. Where, upon trial of theft, the declarations of a third party with reference to the taking of the property was admitted in evidence in connection with defendant's declarations as to the same at the same time, there was no error; nor was there error in admitting testimony as to the efforts which were made to find the property. Lane v. State, 65.

2. Upon trial of burglary, there was no error in admitting the statements of the State's witness as to what he did in trying to shield the prosecutrix shortly before the burglary from the defendant because defendant was drunk, etc., there being other testimony to the same effect which led up to what defendant said he was going to do. Alsup v. State, 117.

3. Conversations between the witness and third parties in the absence of the defendant are inadmissible in evidence, having no direct connection with the offense. Manley v. State, 169.

4. Where, upon trial of murder, the State was permitted to introduce a declaration by a third party asking why the defendant had committed the act, to which he made no reply, and which was said in his hearing and threw light on the transaction, being made just thereafter, there was no error. Following Ryan v. State, 64 Texas Crim. Rep., 628, and other cases. McKelvey v. State, 538.

Dedication of Street.

Where the dedication of a certain street had nothing to do with the facts concerning the homicide and this matter had been fully explained by other testimony, there was no error in refusing to admit in evidence a certain map to show the dedication of this street. Salmon v. State, 506.

Deed.

Where the language objected to in the indictment must be regarded as surplusage, and the whole of the count in said indictment clearly charges an offense, the same is sufficient; and where defendant was charged with forgery of a land title under the statute, Article 947, Penal Code, the indictment complied with this rule, there was no error. Thompson v. State, 31.

Deer. See Gaming Law.

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Defendant After Arrest. See Declarations and Acts of Defendant, 4.

Defendant as a Witness.

1. The court's failure to charge the jury that the defendant could testify in his own case, but a failure to do so should not be considered against him or alluded to or discussed by the jury; there being no contention that the jury did allude thereto, was not reversible error. Following Morrison v. State, 40 Texas Crim. Rep., 473. Boseley v. State, 100.

2. Where, upon trial of accessory after the fact to the crime of seduction, the State introduced defendant's testimony before the grand jury, and it appeared from the record that at that time he was not under arrest or charged with a crime in any manner, but voluntarily gave his testimony without claiming self-incrimination, there was no error; besides, the bill of exceptions was defective. Harrison v. State, 291.

Defensive Theories.

1. Where, upon trial of murder, the court submitted to the jury all of defendant's theories of defense, the reasonable doubt, etc., there was no error. Garrett v. State, 462.

2. Where, upon trial of theft of a hog, the evidence showed that defendant claimed to have purchased the hogs, the meat of which was found in his possession, etc., the court should have submitted his defensive theories of the case. Matthews v. State, 639.

Definition of an Accessory After the Fact. See Accessory, 2.

See opinion for construction of Article 86, Penal Code, qualifying and partly disapproving the following cases: Shaekey v. State, 41 Texas Crim. Rep., 255; Chenault v. State, 46 Texas Crim. Rep., 351; Hargrove v. State, 63 Texas Crim. Rep., 143; Chitister v. State, 33 Texas Crim. Rep., 635; Gann v. State, 42 Texas Crim. Rep., 133; Miller v. State, 72 S. W. Rep., 996; Dent v. State, 43 Texas Crim. Rep., 126. Harrison v. State, 291.

Degree of Offense. See Verdict, 1.

Denial of Bail.

Where the proof is evident in a capital case, the relator is not entitled to bail. Ex Parte Andrus, 183.

Deposition. See Want of Diligence, 2.

Description. See Indictment; Private Residence, 3; Variance, 2.

Dice, Betting at. See Gaming, 3.

Different Counts. See Election by State.

There was no error in overruling defendant's motion in arrest of judgment because of the two counts in the indictment under which the cause was submitted. Following Cabiness v. State, 66 Texas Crim. Rep., 409. Brown v. State, 138.

Different Courts. See Severance.

Different Offenses. See Indictment, 24.

Discretion of Court.

1. Even the first application for continuance need not be granted as a matter of right, but is addressed to the sound discretion of the trial judge, and where such discretion is not abused, there was no error. Fletcher v. State, 135.

2. Under Article 718, Code Criminal Procedure, there was no error in permitting the State to introduce a witness after the defendant had closed his evidence, who testified that he had examined the ground over which deceased had traveled immediately after the shooting and found no weapon; this was within the sound discretion of the court; the testimony being clearly admissible. Decker v. State, 410.

Disgrace. See Aggravated Assault, 5.

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Disorderly House. See City Charter and Ordinance, 2.

Upon trial of keeping a disorderly house for the purpose of prostitution, there was no error in admitting testimony that the witness was a prostitute and plied her vocation in said house stating the attendant circumstances. Clyman v. State, 638.

Distinct Offense.

Where the indictment charged the defendant with pursuing the business or occupation of selling intoxicating liquors in local option territory, the same is a distinct offense from making a sale of intoxicating liquors in local option territory and is a felony. Following Fitch v. State, 58 Texas Crim. Rep., 366, Byrd v. State, 35.

District Attorney. See Conduct of District Attorney.

District Court. See Special Term of.

1. The law now is that no notice whatever of thirty days or any other time is required to be given and published of the convening of any special term of the District Court, and the district judge at such special term can make any order that he could make at any regular term of the court, including that of changing the venue in a case, whether he transact any other business or not. Following Ex Parte Martinez, 66 Texas Crim. Rep., 1, and other cases. Mayhew v. State, 187.

2. Where defendant was indicted as a tax assessor of Dallas County for failure to make the report required by law showing the fees collected by him, etc., it was error to transfer the case to the County Court, as the District Court has the exclusive jurisdiction thereof. Bolton v. State, 582.

District Judge. See Change of Venue; Immunity.

1. Under Article 626, Code Criminal Procedure, the district judge of his own motion has the right to change the venue of a criminal case, and unless he abuses his discretion, the Appellate Court will not interefere. Following Bohannon v. State, 14 Texas Crim. App., 271, and other cases. Mayhew v. State, 187.

2. Where, upon trial of assault to murder, the district judge was called to the bedside of a sick child during the trial, and thereupon one of the counsel of the defendant and the district attorney agreed upon a special judge to proceed with the trial, the judgment of conviction, in the absence of the regular judge, is a nullity and void; it not being shown that the regular judge was disqualified. Summerlin v. State, 275.

Disturbing Peace. See Indictment, 20.

Where, upon trial of disturbing the peace, the evidence showed that the defendant willfully used loud and vociferous language in a manner calculated to disturb the inhabitants of a public place, the conviction was sustained. Hart v. State, 417.

Disturbing Religious Worship. See Sufficiency of Evidence, 2.

Where, upon trial of unlawfully and willfully disturbing a congregation assembled for religious worship, the charge of the court, although inaptly worded, sufficiently informed the jury that the act of the defendant must have been willfully done, there was no error. Laird v. State, 553.

Druggist.

Where there was no evidence that the defendant was a druggist or had license to sell on prescription, and that idea was excluded entirely, the criticism that the court's charge authorized the jury to convict a druggist who sells intoxicating liquors on prescription is wholly untenable. Pierce v. State, 175.

Drunkenness.

In the absence of testimony that the prosecuting witness was drunk, there was no error in excluding testimony that when he was drunk that he did not know anything until he became sober. Caples v. State, 394.

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Duress.

The law does not require that procuring shall be done by fraud, duress, etc., but intends to prohibit persons from bringing into this State women to practice prostitution, and this, although the woman may be a prostitute, and there was no error in the court's refusal of defendant's requested charge requiring that the procuring must be done by fraud, etc. McDowell v. State, 545.

Duty of Codifiers.

Under the Act of March 19, 1909, p. 130, the codifiers were simply authorized to adopt such of the Revised Statutes, Civil and Criminal, as had not been repealed or amended, and that they should not change the words or punctuations thereof except in cases of evident, clerical or typographical errors, etc.. Durham v. State, 71.

Dying Declarations.

Where the proper predicate was laid and the dying declarations based thereon were admitted, there was no error; and even that part of deceased's declarations which the court, on a former appeal, held to be inadmissible, and which was not in fact admitted, was admissible. Following Pierson v. State, 18 Texas Crim. App., 524, and other cases. Manley v. State, 502.

Election. See Field Notes.

Election by State.

Where the indictment in a misdemeanor case charged the offense in two separate counts, the State could not be required to elect; besides, the court only submitted one count and this in itself was an election. Mueller v. State, 158.

Embezzlement. See Indictment, 16; Partnership.

Where the check described in the indictment for embezzlement and that introduced in evidence were exactly alike, except the check introduced had the monogram of the bank printed in the upper left-hand corner, which was not descriptive of the check, there was no variance. Following May v. State, 15 Texas Crim. App., 430. Irby v. State, 619.

Enclosure.

Article 804, Penal Code, of the Act of 1895 did not apply to inclosures of two thousand acres or more, as provided by Article 805, id. Berry v. State, 602.

Entry.

Where the court gave the proper charge on entry of the house, there was no error in refusing special charges which were not based on the evidence. Peters v. State, 403.

Error Must Be Pointed Out.

While the complaint to the charge of the court may be preserved by bill of exceptions or by a ground in the motion for new trial, yet, in either event, the alleged error must be specifically pointed out or it will not be considered on appeal. Following Sims v. State, 30 Texas Crim. App., 605, and other cases. Byrd v. State, 35.

Escape.

Where, upon appeal from a conviction of pursuing the occupation of selling intoxicating liquors in local option territory, the affidavit of the sheriff accompanying the record showed that appellant had escaped from jail and not voluntarily returned within ten days from date of escape, the appeal must be dismissed. Cobb v. State, 619.

Evidence. See Absent Witness, 2; Accessory, 1; Accomplice; Aggravated Assault, 4; Agreement in Other Case; Almanac; Arrest; Bias of Witness; Bill of Exceptions; Bloody Clothing; Books; Character of Deceased; Circumstantial Evidence; Clothes of Deceased; Coconspirator; Codefendant; Comparison

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Evidence—Continued.
of Handwriting; Conclusion of Witness; Confessions; Conspiracy; Contradicting Witness; Conversation; Convict; Credibility of Witness; Cross-examination; Custom; Date of Offense; Date of Sale; Declarations and Acts of Deceased; Declarations and Acts of Defendant; Declarations and Acts of Third Party; Defendant as a Witness, 2; Discretion of Court, 2; Disorderly House; Drunkenness; Dying Declarations; Examining Trial Testimony; Exculpatory Statement; Expert Opinion; Eyewitness; Facts Brought out by Defendant; Flight; Former Conviction, 2; Former Difficulty; Fruits of Crime; General Reputation; Husband and Wife; Hearsay; Ill Will; Impeaching Witness; Insult to Female Relative, 3; Law in Force; Motive; Moral Turpitude; Murder; Names of Persons under Treatment; Non-expert Testimony; Opinion of Witness; Other Acts of Intercourse; Other Offenses; Other Sales; Other Testimony; Other Transactions; Outcry; Papers in Civil Suits; Pardon; Physical Examination; Practice in District Court; Precedent; Private Residence; Rebuttal; Recalling Witness; Res Gestae; Repetition; Reproduction of Testimony; Reputation of Deceased; Revenue License; Self-serving Declarations; Shorthand Facts; Signature; Signature of Judge; Specific Acts; Stenographer's Transcript; Subterfuge; Supporting Testimony; Theft of Cattle; Threats; Trespasser; Undisclosed Motive; Unrecorded Brand; Vagrancy; Value, 2; Warning; Witness.

1. Where defendant was permitted to testify that he did not fire the pistol, there was no error in permitting testimony that the officer who found defendant in possession thereof heard shooting in that direction. Crain v. State, 55.

2. Upon trial of burglary, there was no error in admitting testimony showing the condition of the room alleged to have been burglarized immediately after defendant was arrested. Alsup v. State, 117.

3. Where the issue was material, there was no error in admitting testimony as to the relative size and age of the parties. Sanchez v. State, 134.

4. Where, upon trial of adultery, the evidence showed that the defendant and his paramour lived together for some time, there was no error in admitting testimony that delivery wagons carried groceries to the house where they lived together and that defendant told a State's witness that his paramour was a married woman at the time, etc.; besides, the bill of exceptions was defective and all this testimony was brought out by defendant. Brown v. State, 138.

5. Where defendant complained that the court permitted the introduction of part of his application for a continuance, but the court's qualification showed that this was not true; that only a reference was made thereto in argument, there was no error. Pierce v. State, 175.

6. Upon trial of assault with intent to rob, there was no error in introducing testimony that the officer found a pistol near the scene of the attempted robbery; there being other testimony that defendant had a pistol at that time. Wingate v. State, 234.

7. Where, upon trial of burglary, the circumstances indicated that the alleged room had been unlocked, there was no error in admitting testimony describing certain keys found in defendant's possession, one of which exactly fitted the keyhole of the door of the said room, and it was not necessary to exhibit said keys to the jury as the best evidence; besides, it was shown that the keys were lost. Hollis v. State, 286.

8. Where the bill of exceptions failed to set out the questions propounded or the answers given thereto or what testimony was admitted, there was nothing to review on appeal. Nesbitt v. State, 374.

9. Where, upon trial of murder, the court refused to admit testimony about deceased's having been once confined in the penitentiary and no bill of exceptions was reserved, the same could not be considered on appeal. Peters v. State, 561.

10. Where, upon appeal from a conviction of murder, the qualification of the bills of exception by the trial judge showed that the court did not err in sustaining the State's objection to defendant's question to the State's witness as to whether he was the witness in certain prosecutions for selling liquor, there was no error; besides, the bill of exceptions was defective. Christie v. State, 598.

11. Where the money alleged to have been embezzled was delivered to

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Evidence—Continued.
defendant to pay a balance due to the State on land, and the letter written by the defendant, which was introduced in evidence, pretended to enclose a receipt for said money, such letter was admissible in evidence to throw light on defendant's intent to embezzle the money when he deposited it in his own name. Irby v. State, 619.

12. Where testimony which was first ruled out by the court was afterwards admitted on behalf of defendant, there was no error. Simmons v. State, 624.

13. Upon trial of robbery, there was no error in admitting testimony that the State's witness loaned the defendant some money and that the day after the robbery, he paid it back, and that defendant had no money prior to said date. Perry v. State, 644.

14. Upon trial of murder, there was no error in excluding testimony that the State's witness had a pistol on the day prior to the homicide. Bogue v. State, 656.

Examining Trial Testimony.

Where, upon trial of assault to murder, the defendant, in order to impeach or contradict the main State's witness, offered the entire examining testimony of the said witness, without laying a predicate therefor, and no part of the testimony was pointed out which defendant sought to impeach, there was no error in refusing the same. Rhodes v. State, 45.

Excessive Punishment. See Aggravated Assault, 2; Punishment.

Exculpatory Statements. See Confessions, 1; Declarations and Acts of Defendant, 1; Recent Possession, 4.

1. The statutes governing the admissibility of confessions made under arrest did not apply to nor include statements which are wholly exculpatory, even though the State should introduce other evidence showing that such exculpatory statements are false. Following Ferguson v. State, 31 Texas Crim. Rep., 93. Distinguishing Morales v. State, 36 Texas Crim. Rep., 234. Whorton v. State, 1.

2. Where, upon trial of violating the gaming laws, the State introduced exculpatory evidence and the defendant denied the offense, and the State could have procured witnesses to disprove such exculpatory testimony if untrue, but failed to do so, the conviction could not be sustained. Bowen v. State, 242.

Expert Opinion.

Where defendant introduced an expert witness and was permitted to show by him all the facts to which he could legitimately testify, there was no error in excluding the opinion of said witness as to whether or not under the circumstances in the case, the wound was intentionally inflicted or accidentally done; this was not a subject of expert testimony. Davis v. State, 420.

Expert Testimony. See Reproduction of Testimony, 3.

Explanation. See Recent Possession.

Where, upon trial of murder, the evidence raised circumstantially the question that defendant approached deceased for an explanation of certain troubles between them, the court properly submitted a charge thereon; besides, this was in favor of defendant, and he could not complain. Powdrill v. State, 340.

Express Company. See Books.

Eyewitnesses. See Practice in District Court, 2.

Under the common law, a rule of law was sanctioned where, by motion filed, the defendant could require the State to introduce all eyewitnesses to the transaction, but this is not the rule under the statutes of this State. Pugh v. State, 357.

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Facts Brought Out by Defendant.

Where the State did not bring out the testimony with reference to a statement made to the witness by a cashier of the bank, but the same was brought out by defendant without objection and was then excluded by the court, there was no error. Irby v. State, 619.

Fair Trial. See Statutes Construed, 5.

Felony. See Bail Bond; Distinct Offense; Former Conviction, 3.

Field Notes.

Where, upon trial of a violation of the local option law, the defendant complained that the field notes describing the commissioner's precinct in which the local option law was violated did not close, and that, therefore, the local option election was void; yet, where the calls were such in the field notes that anyone on the ground from known marks on the ground could clearly trace the line, there was no such discrepancy as would vitiate the creation of the precinct, and the election was valid. Following Williams v. State, 52 Texas Crim. Rep., 371. Stewart v. State, 384.

Figures. See Indictment, 26.

Filing. See Statement of Facts. Transcript.

Where, upon appeal from a conviction of robbery, it appeared from the record that the bills of exception were not filed within time, they were stricken out on motion of the State. Perry v. State, 644.

Filing in Misdemeanor Cases.

Neither the Revised Statutes, Civil and Criminal, nor the Act of March 31, 1911, p. 264, repeal or otherwise affect the Act of May 14, 1907, p. 446; and a statement of facts in a County Court misdemeanor case must be filed within term time, unless an order of the court during term time is made authorizing it to be filed within twenty days after adjournment; and it must be filed within the time so allowed and which cannot be extended beyond twenty days. Following DeFriend v. State, 69 Texas Crim. Rep., 329. Durham v. State, 71.

Filing Statement of Facts. See Statutes Construed, 2.

Fining Witness.

Where the record on appeal showed that the witness who was fined while testifying willfully evaded answering questions by which the court did not seek to control the answers thereto, and which did not indicate the opinion of the court as to the guilt of the defendant and no injury was shown to the defendant, there was no reversible error. Loan v. State, 221.

Flight.

1. Where, upon trial of theft of a horse, the State introduced evidence tending to show the flight of the defendant, it was error not to permit the defendant to show that he voluntarily returned and did not attempt to flee. LaFell v. State, 307.

2. Upon trial of robbery, there was no error in permitting the State to show that shortly after the alleged robbery search was made for the defendant and he could not be found, and that he was subsequently arrested in a distant county. Perry v. State, 644.

Force. See Self-defense, 11, 15.

Forgery. See Comparison of Handwriting; Deed; Invited Error, 1; Signature.

1. Where, upon trial of forgery, the evidence was sufficient to support the conviction, and the requested charges were either given or covered by the court's main charge, there was no error. Whorton v. State, 1.

2. Under Article 924, Penal Code, it is not required to allege specifically that the forged instrument was in writing, it was, therefore, unnecessary to allege that the instrument was in writing. Thompson v. State, 31.

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Former Conviction.

1. Where, upon appeal from a conviction of assault to rape, it appeared from the record that the defendant pleaded guilty to aggravated assault on an information filed in the County Court for the same transaction under a fraudulent effort to oust the jurisdiction of the District Court of the case there pending for assault with intent to rape, the court properly struck out said plea. This was specially authorized under Article 63, Code Criminal Procedure, as amended. Taff v. State, 528.

2. Where defendant's plea of former conviction was wholly insufficient and was no bar to the offense for which he was being tried, there was no error in not permitting the defendant to offer testimony as to the conduct of the prosecuting officer in said former trial, or to show that the transaction was the same. Wilson v. State, 567.

3. Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the record showed on appeal that prohibition was in force prior to the time the felony Act went in force, and that defendant had been prosecuted and convicted in the County Court under said law for violating the local option law by making single sales, he could not plead these convictions as former jeopardy, as the offense for which he had been convicted was separate and distinct from the offense for which he was being tried. Following Robinson v. State, 66 Texas Crim. Rep., 392. Id.

Former Decision.

Where, upon a former appeal, this court did not pass upon the question of manslaughter, but the case was reversed upon another ground, and the court merely called attention to the question of manslaughter, the instant case cannot be controlled by that opinion; besides, the court charged upon manslaughter in the instant case on the only possible theory suggested by the evidence, and there was no error. Powdrill v. State, 340.

Former Difficulty.

Upon trial of murder, there was no error in permitting the State to introduce testimony as to a former difficulty between the defendant and deceased occurring several years before the homicide, as to what was said and done during that difficulty, without giving the details thereof, but showing that defendant made an assault with a knife upon deceased and that the difficulty grew out of the separation of his parents and ending by defendant telling deceased, his son, to leave his house; and this, although a partial reconciliation had occurred some time before the killing. Davidson, Presiding Judge, dissenting. Powdrill v. State, 340.

Former Law.

While the codifiers of the Civil Revised Statutes of 1911 copied the various sections of the various Acts, etc., including the Act of 1909, p. 374; yet, in the Act of 1911, adopting said Revised Statutes, the laws of that Session were not affected by the repealing clause of said Act, and by the Act of March 31, 1911, p. 264, of that Session, the Act of 1909, supra, which had been copied in said Revised Codes, Civil and Criminal, was expressly repealed, and the Act of May 14, 1907, supra, was in no way affected or repealed. Durham v. State, 71.

Former Marriage.

Where, upon trial of incest, it appeared that defendant had been married prior to his marriage to the mother of prosecuting witness and there was no evidence that the former wife was dead or the marriage had been legally dissolved, the conviction could not be sustained. The fact that defendant had a son when he married the second time, would not raise the presumption that the latter was a bastard. Following McGrew v. State, 13 Texas Crim. App., 340. Vickers v. State, 628.

Former Trial. See Misconduct of Jury, 3.

Form of Indictment.

An indictment will not be held insufficient nor shall the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfec-

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Form of Indictment—Continued.
tion of form in such indictment which does not prejudice the rights of defendant. Article 476, C. C. P. Thompson v. State, 31.

Fraud. See Duress.

Fraudulent Intent.

1. Where the court's charge on fraudulent intent was in substantial accord with approved precedent, there was no error. Lane v. State, 65.

2. Where, upon trial of theft of cattle, the evidence showed that the defendant was connected with the original taking, there was no error in refusing a requested charge that if defendant only assisted in procuring the property for another, to acquit him. Powers v. State, 214.

Fruits of Crime. See Arrest.

Upon trial of theft of money over the value of $50, there was no error in admitting testimony that immediately after the arrest of defendant, the latter requested the witness to carry him to the bank and that when he got there, he talked with the banker and deposited with him $800, part of which was that alleged to have been stolen; this was admissible under Article 810, Code Criminal Procedure. Following Martin v. State, 57 Texas Crim. Rep., 595, and other cases. Manley v. State, 169.

Fugitive From Justice.

Where it appeared that the principal, in a prosecution of the accessory, was a fugitive from justice, but it appeared from the record that defendant made no motion to require the State to first try the principal and did not show that the principal had been arrested or could be tried, a complaint in a motion for new trial on this ground came too late. Harrison v. State, 291.

Gaming.

1. Where, upon trial of keeping a gambling house, the evidence sustained the conviction, there was no error. Polk v. State, 53.

2. Where, upon trial of playing a game of cards in violation of law and unlawfully remaining in a gambling house, the evidence was insufficient to sustain a conviction, the judgment must be reversed and the cause remanded. Bowen v. State, 242.

3. Where, upon trial of betting at dice, the evidence showed that the defendant threw the dice and put up his money, the conviction was sustained, although the State's witness did not remember any specific bet made by the defendant, there being several engaged in the throwing of dice. Scott v. State, 615.

4. Where, upon trial of betting at a game of dice, no other reasonable conclusion could be reached by the evidence, as a whole, than that the offense was committed on or about the date alleged in the information, and no question of limitation having been raised by the evidence, the conviction was sustained. Scott v. State, 616.

Game Law.

Where, upon trial of unlawfully killing a wild deer, the evidence sufficiently fixed the date of the offense and that the deer was killed out of season, the conviction was sustained. Baker v. State, 50.

General Objections.

1. An objection that the verdict is contrary to the law and the evidence only presents the question, that the testimony does not sustain the verdict, for review. Pierce v. State, 175.

2. An objection that the court erred in submitting to the jury paragraph 1 of the court's general charge, without pointing out the error, is too general to be considered on appeal. Following Quintana v. State, 29 Texas Crim. App., 401. Misher v. State, 223.

3. Where the objection to the court's charge is that the court erred in not charging on mutual combat, as defendant's testimony warranted such charge,

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General Objections—Continued.
the same is entirely too general to be considered on appeal; besides, this issue was not raised by the evidence and there was no bill of exceptions or complaint in the motion for new trial. Martinez v. State, 280.

4. General objections to the charge of the court without pointing out the error complained of cannot be considered on appeal, although a number of errors thereon are assigned in the brief. Following Ryan v. State, 64 Texas Crim. Rep., 628, and other cases. Stewart v. State, 384.

5. Where, appellant's complaint concerning the charge of the court are entirely too general, they cannot be considered on appeal. Following Berg v. State, 64 Texas Crim. Rep., 612, and other cases. Jones v. State, 447.

6. Where, upon appeal from a conviction of murder in the second degree, the appellant complained in a general way that the court should have charged on manslaughter, the same could not be considered. Besides, the evidence did not raise the issue of manslaughter. Following Mansfield v. State, 62 Texas Crim. Rep., 631, and other cases. Davidson, presiding judge, dissenting. Garrett v. State, 462.

7. General objections to the court's charge without pointing out error cannot be considered on appeal; besides, the court's charge was sufficient. Following Sue v. State, 52 Texas Crim. Rep., 122, and other cases. McDowell v. State, 545.

8. Where the error assigned on the refusal of submitting requested charges was of a general character without pointing out any error, the same could not be considered on appeal; besides, there was no error in refusing them. Following Berg v. State, 64 Texas Crim. Rep., 612, and other cases. Wilson v. State, 567.

9. An objection to the charge of the court in a general way without pointing out specific error cannot be considered on appeal. Following Ryan v. State, 64 Texas Crim. Rep., 628, and other cases. Id.

General Reputation.

1. Upon trial of keeping a disorderly house for the sale of intoxicating liquors without license, testimony as to the general reputation of the place is admissible in evidence. Following Joliff v. State, 53 Texas Crim. Rep., 61. Johnson v. State, 107.

2. Where the State sought to contradict defendant's witness, but not to attack his general reputation for truth and veracity, there was no error in no permitting defendant to introduce testimony of the general reputation of said witness. Mayhew v. State, 187.

3. Where, upon trial of theft from the person, there was evidence tending to show that another party committed the theft, the reputation of such party was an issue in the case and testimony as to his general reputation was admissible. Hall v. Sate, 332.

Grammar. See Indictment, 22; Words and Phrases, 2.

Grand Jury. See Defendant as a Witness, 2; Variance; Warning.

Habeas Corpus.

The relator in an application for habeas corpus cannot appeal from an order refusing to issue the writ of habeas corpus. Following Ex parte Blankenship, 5 Texas Crim. App., 218, 57 S. W. Rep. 646, and other cases. Ex parte Copeley, 253.

Handwriting. See Comparison of Handwriting.

Harmless Error. See Credibility of Witness, 3; Number of Sales.

1. Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the court erroneously instructed the jury that in case of a reasonable doubt, they might convict defendant for a violation of the local option law if he made one sale under it, and which subjected him to a fine and confinement in the county jail, the error was harmless, as he was not convicted of that offense and the same is entirely distinct from the one for which he was tried and convicted. Pierce v. State, 175.

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Harmless Error—Continued.

2. Where the court admitted in evidence hearsay evidence over the objections of the defendant, the same was improper but harmless error, inasmuch as the defendant and other witnesses testified to the same thing. Valigura v. State, 320.

Hearsay. See Harmless Error, 2.

Upon trial of murder, there was no error in not permitting defendant's witness to testify what another had told him about the stick that was used by the deceased in killing defendant's son. Decker v. State, 410.

Hogs at Large. See City Charter and Ordinance, 1.

Husband and Wife. See Ownership, 1.

1. Where the objections to the cross-examination of defendant's wife did not point out any error, the conviction was sustained. Robinson v. State, 87.

2. Upon trial of unlawful practicing medicine, there was no error in showing that the persons treated by the defendant paid defendant's wife in his presence for such treatment; besides, it was shown by other testimony that defendant received payment directly and indirectly for such medical treatment. Mueller v. State, 158.

3. Where, upon appeal from a conviction of murder in the second degree, the bills of exception with reference to the cross-examination of defendant's wife were of a general character, the same need not be considered; but if the statement of facts were consulted, there was no error in permitting the State, on cross-examination of defendant's wife, who had testified on the trial that deceased was armed, to show that she testified before the justice of the peace that deceased was not armed at the time of the homicide; the State not attempting to introduce her former written statement, but her testimony at the inquest proceedings. Perry v. State, 184.

4. Where, upon trial of incest, the State was permitted to introduce the former wife of defendant to prove by her that during their marriage and at the time of the alleged offense, she was pregnant, to convey the idea that defendant would not probably have sexual intercourse with her at that time, but would be more likely to have such intercourse with his step-daughter, the same was reversible error. Articles 774 and 775, Code Criminal Procedure. Distinguishing Cole v. State, 51 Texas Crim. Rep., 89; Richards v. State, 55 id., 278. Vickers v. State, 628.

5. Where defendant's wife had been introduced as a witness to testify to material facts in behalf of her husband, the defendant, there was no error in permitting the State to prove by her that she had been convicted of the offense of keeping a disorderly house, which was an offense involving moral turpitude. Bogue v. State, 656.

Idem Sonans.

Where defendant contended that the juror's name to whom he objected was Andres and not Andrews, and there was no question as to his identity, there was no error in overruling the objection; besides, the names are idem sonans. Following Gentry v. State, 62 Texas Crim. Rep., 497, and other cases. Valigura v. State, 320.

Identification. See Bill of Exceptions, 5; Opinion of Witness, 2; Theft, 10.

Ignorance of the Law.

Ignorance of the law excuses no one, and it is a violation of the law to carry a pistol even though one should place one part of it in one pocket and another part in another pocket; the pistol being in no way out of repair. Crain v. State, 55.

Illegal Hunting.

The Act of 1899 did not repeal Article 804, Penal Code, of the Act of 1895, and the Act of 1903 did not repeal the Act of 1899 with reference to hunting in inclosed lands of another. Berry v. State, 602.

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Illegal Practice of Medicine. See Advertisement; Indictment, 8.

1. Where, upon trial of unlawfully practicing medicine by publicly professing to be a physician, without having first registered a license, etc., the evidence supported the conviction, there was no error; see opinion for facts showing that defendant held himself out as a physician for pay without license. Mueller v. State, 158.

2. Upon trial of practicing medicine without authority, etc., where the evidence showed that defendant treated and offered to treat paralysis, rheumatism, asthma, etc., making specific charges for the treatment thereof, without having registered his authority to do so, conviction was sustained. Lewis v. State, 593.

Ill Will.

Upon trial of murder, where the fact that ill will existed between defendant and deceased was not disputed, there was no error in excluding testimony with reference to conduct of deceased towards a third party showing that deceased had a pistol at his residence. Salmon v. State, 506.

Immunity.

An agreement between defendant and the prosecuting officers promising immunity from further prosecution is not valid without the approval of the district judge, where such agreement is offered in bar to the prosecutions then pending. Following Johnson v. State, 66 Texas Crim. Rep., 586, and other cases. Wilson v. State, 567.

Impeachment. See Accomplice, 9; Reproduction of Testimony, 6.

Impeaching Own Witness. See Charge of Court, 10.

Upon trial of robbery, there was no error, under Article 795, Code Criminal Procedure, to permit the State who claimed surprise to show that its witness had made a different statement as to the party who committed the robbery from the one he had made on the stand. Perry v. State, 644.

Impeaching Testimony.

Where the testimony of the State was purely impeaching in its character and not admissible as original testimony, or as testimony upon which the conviction could be predicated, it should have been limited in the court's charge, and a failure to do so was reversible error. Following Henderson v. State, 58 Texas Crim. Rep., 581, and other cases. Jones v. State, 497.

Impeaching Witness.

1. Where the alleged confessions introduced in evidence were not those of defendant, but those made by a companion and were introduced to impeach the latter's testimony with reference to defendant's alibi, there was no error; the court properly limiting such testimony for the purposes of impeachment. Wingate v. State, 234.

2. Where the defense had laid a predicate to impeach the testimony of the prosecuting witness, there was no error in anticipating such attack upon the witness and permitting the State to show that said witness had made similar statements to others with reference to certain things. Caples v. State, 394.

3. Upon trial of a violation of the local option law, there was no error in not permitting the defendant to ask a State's witness what he had sworn to in another case with a view of impeaching him, the matter having no connection with the case on trial. Ellis v. State, 468.

Imputing Crime to Another.

1. Where defendant contended that another committed the murder, the court properly submitted that question to the jury, instructing them to acquit defendant in case of a reasonable doubt. Following Blocker v. State, 55 Texas Crim. Rep., 30. Pace v. State, 27.

2. Where upon trial of theft from the person, there was evidence that another person committed the theft, this issue should have been submitted to the jury in a proper charge, as requested by the defendant. Hall v. State, 332.

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Imputing Crime to Another—Continued.

3. Where the witness could not recall who the persons were that talked about whipping the prosecuting witness some months before the alleged offense, there was no error in excluding his testimony. Caples v. State, 394.

4. Where, upon trial of robbery, the defense was an alibi and imputing the crime to another, and the court's charge properly submitted these issues to the jury, there was no error. Serop v. State, 399.

Incest.

Where, upon trial of incest, the State established its case by the testimony of the prosecutrix, which was corroborated by the fact that the defendant made an effort to produce an abortion on prosecutrix and also attempted to commit suicide, etc., the corroboration of the accomplice testimony was sufficient. Vickers v. State, 628.

Inculpatory Statement. See Confessions, 2.

Independent Design. See Statutes Construed, 4.

Independent Impulse.

Where there was no evidence that defendant and his brother were acting together at the time of the homicide, upon a previous understanding, and there was evidence that defendant's brother killed deceased, the court's charge should not have required that he must have acted upon an independent impulse. Spencer v. State, 92.

Independent Statement of Facts.

The Act of May 1, 1909, p. 374, provided that nothing in that Act shall be so construed as to prevent parties from preparing statement of facts on appeal independent of the transcript of the notes of the official shorthand reporter, and thus did not expressly repeal that part of the Act of 1907, p. 509. Durham v. State, 71.

Indictment. See Date of Offense; Deed; Different Counts; Forgery, 2; Form of Indictment; Indorsement; Limitation, 1; Name of Injured Party, 2; Names of Witnesses; Rule Stated, 1; Surplussage; Variance; Words and Phrases, 1, 2.

1. Where the endorsement on the alleged forged check was made at the bank where it was cashed, at the banker's request, it was not necessary to allege such endorsement in the indictment. Following Crayton v. State, 47 Texas Crim. Rep., 88, and others. Whorton v. State, 1.

2. In construing indictments, the statute requires that the context and subject matter in which the words therein are employed shall be taken into consideration, and the certainty required is such as will enable the accused to plead the judgment in bar of another prosecution. Article 453, C. C. P. Thompson v. State, 31.

3. Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the indictment followed approved precedent, the same was sufficient. Following Mizell v. State, 59 Texas Crim. Rep., 226, and other cases. Byrd v. State, 35.

4. Where, upon trial of keeping and being interested in keeping certain premises for the purpose of being used as a place for gambling, the indictment charged an offense under the laws of the State, the same was sufficient. Polk v. State, 53.

5. Where the allegation in the indictment as to the description of the alleged stolen money was sufficient under Articles 458 and 468, Code Criminal Procedure, there was no error. Following Sims v. State, 64 Texas Crim. Rep., 435. Lane v. State, 65.

6. Where the word, "teo," was in fact, "ten," with reference to the date alleged in the indictment, when taken in connection with the entire sentence employed, there was no error in overruling a motion to quash on that account. Following Lewis v. State, 55 Texas Crim. Rep., 167, and other cases. Rogers v. State, 90.

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Indictment—Continued.

7. Where the indictment, in a prosecution for bribing a witness, did not allege what character of process from the grand jury defendant sought to induce the alleged witness to avoid, or that it was unknown to them, etc., the indictment was insufficient. Harrison v. State, 152.

8. Where, upon trial of unlawfully practicing medicine, the indictment followed approved precedent, the same was sufficient. Following Singh v. State, 66 Texas Crim. Rep., 156, and other cases. Mueller v. State, 158.

9. Wherever the grand jury could have known by ordinary diligence the true facts, they are not authorized to set out by averment in an indictment an excuse for not setting out the real facts. Following Carlton v. State, 60 Texas Crim. Rep., 584, and other cases. Collum v. State, 165.

10. Where, upon trial of unlawfully pursuing the occupation of selling intoxicating liquors in local option territory, the indictment followed approved precedent, there was no error. Following Slack v. State, 61 Texas Crim. Rep., 372. Misher v. State, 223.

11. Where, upon trial of assault with intent to rob, the indictment followed approved precedent, the same was sufficient. Wingate v. State, 234.

12. Where, upon trial of a violation of the Sunday Law, the indictment followed approved precedent, there was no error. Following Gould v. State, 66 Texas Crim. Rep., 122. Gould v. State, 250.

13. Where, upon trial of murder, the indictment followed approved precedent, there was no error in overruling a motion to quash. Lucas v. State, 269.

14. Where, upon trial of accessory after the fact to the crime of seduction, the indictment followed approved precedents, the same was sufficient. Following Gann v. State, 42 Texas Crim. Rep., 133. Harrison v. State, 291.

15. Where, upon trial of seduction, the indictment followed approved precedent, there was no error. Walls v. State, 317.

16. Where, upon trial of embezzlement, the indictment followed approved precedent and properly described the money embezzled, there was no error in overruling a motion to quash. Poteet v. State, 322.

17. Where the indictment for perjury failed to negative the fact that a mortgage had been given, as claimed by defendant's testimony upon which the charge of perjury was based, and failed to negative the fact that the party had disposed of mortgaged property, etc., the same was insufficient on motion to quash. Waddle v. State, 334.

18. Where the indictment for burglary alleged that the offense was committed by force, threats and fraud, the same covered either a daytime or a night-time burglary. Following Carr v. State, 19 Texas Crim. App., 635, and other cases. Stephens v. State, 379.

19. Inasmuch as our statute has created a difference between principals and accomplices, it necessarily follows that indictments must follow this distinction in charging the imputed dereliction, as an accomplice cannot be convicted under an indictment charging the party as a principal, or vice versa. Cooper v. State, 405.

20. Where the word "street" was spelled "stree," in the indictment, the indictment was, nevertheless, sufficient when construed as a whole, and there was no error in overruling a motion in arrest of judgment. Following Bailey v. State, 63 Texas Crim. Rep., 586, and other cases. Hart v. State, 417.

21. Under Article 558, Revised Penal Code, a policy game is included within the gaming statute and is prohibited from being kept or exhibited directly or indirectly for the purpose of gaming, and an indictment in the terms of said statutes, alleging that the policy game was kept and exhibited for the purpose of gaming is sufficient. Following Morris v. State, 57 Texas Crim. Rep., 163, and other cases. Polk v. State, 430.

22. Grammatical errors present no ground for quashing an indictment as long as it can be rendered certain, and the omission of the word, "of," in the latter part of the indictment presented no error. Stephens v. State, 437.

23. Where the words objected to with reference to the date of the offense could be treated as mere surplusage, and did not render the indictment in anywise uncertain as to the date of the offense, the same was sufficient on motion to quash. Creed v. State, 464.

24. Where defendant was indicted for a misdemeanor theft in one count

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Indictment—Continued.
and in another for pulling down and injuring the fence of another, which grew out of the same transaction, there was no error in overruling a motion to quash on the ground that the offenses charged did not arise out of the same transaction. Skinner v. State, 488.

25. Where the indictment alleged, without giving the date, that the prohibition law was put in force by election, orders, etc., prior to the time the act making it a felony was passed, the same was sufficient. Following James v. State, 63 Texas Crim. Rep., 75. Robinson v. State, 496.

26. Where the date of the indictment was written so that it was clearly discernible as to what figure was intended in stating the date, there was no error. McKelvey v. State, 538.

27. Where the indictment sufficiently charged the offense of procuring and attempting to procure or being concerned in procuring a female person to come into this State for the purpose of prostitution, the same was sufficient, and there was no error in overruling a motion to quash. McDowell v. State, 545.

28. The Act of 1909, Penal Code, Article 589, making it unlawful to engage in the occupation of selling intoxicating liquors in local option territory is constitutional, and there was no error in overruling defendant's motion to quash the indictment on this ground. Following Fitch v. State, 58 Texas Crim. Rep., 366, and other cases. Wilson v. State, 567.

29. An indictment charging the tax assessor for failure to make the report required by law showing the fees collected by him, etc., should allege that the county of the prosecution had more than fifteen thousand population. Bolton v. State, 582.

30. Where the indictment followed approved precedent in a trial of embezzlement, there was no error; besides there was no motion to quash in the record. Irby v. State, 619.

Indorsement. See Indictment, 1.

Where the main State's witnesses were indorsed on the indictment, a motion requiring the State to indorse on the indictment the names of all its witnesses was correctly overruled. Byrd v. State, 35.

Information.

1. In the absence of a bill of exceptions showing that the information was not signed by the county attorney, the same cannot be considered on appeal; besides, the record showed that the information was so signed. Baker v. State, 50.

2. Where the complaint and information were strictly in accordance with approved precedent, the same were sufficient. Cuellar v. State, 155.

3. Where the evidence showed that the offense was committed four days after the complaint and information were filed, the conviction could not be sustained. Cowan v. State, 614.

4. Where, upon trial of selling intoxicating liquors in non-local option territory without license, the information followed approved precedent, there was no error in overruling a motion to quash. Following Gill v. State, 67 Texas Crim. Rep., 585. Broadnax v. State, 617.

5. Where the complainant swore positively to a sale instead of his belief, and the information and complaint did not negative the fact that a sale was not made on a prescription, etc., the same were, nevertheless, sufficient. Eason v. State, 634.

Insanity. See Burden on State; Charge of Court, 9; Lucid Intervals; Non-expert Testimony.

1. Where defendant, about two months after the homicide, was adjudged insane in the County Court and sent to the lunatic asylum, and afterwards was either discharged or got out in some way and placed on trial for murder, said judgment was no bar to such prosecution, although it covered the time for ten or twelve months prior to the time of the adjudication, but it will be presumed that insanity continued to the time of the alleged offense, and unless such presumption is overcome by competent evidence, the accused is entitled to an acquittal. Witty v. State, 125.

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Insanity—Continued.

2. Where, upon trial of theft of a horse, the court instructed the jury that if they believed from a preponderance of the evidence that at the time the defendant took the alleged animal he was laboring under disease of the mind to such an extent as that he did not know right from wrong, and did not know that the act of taking at the time he did so, if he did so, was wrong, to acquit the defendant, and then charged the converse of the proposition, there was no error. Following Leache v. State, 22 Texas Crim. App., 279. Lester v. State, 426.

Insufficiency of Evidence. See Aggravated Assault, 3; Burglary, 2; Gaming, 2; Local Option, 1; Obstructing Public Road; Occupation, 4; Rape; Theft, 2, 4, 5, 6, 8, 9; Theft of Hog; Theft of Horse, 1.

In the absence of proof that the prohibition law was in force in the county of the prosecution, the conviction cannot be sustained. Robinson v. State, 496.

Insult to Female Relative.

1. Slanderous reports made by deceased concerning the defendant cannot reduce the homicide to manslaughter by the application of the law of insult to a female relative, as the latter is a statutory ground, while slanderous reports have never been declared to be adequate cause. Cloud v. State, 76.

2. Where, upon trial of assault to murder, there was evidence that defendant's actions in meeting the party injured was based upon insulting conduct to his stepdaughter, and that this was the first meeting of the parties, the court's failure to charge an aggravated assault was reversible error. Wilson v. State, 432.

3. Where, upon trial for murder, defendant's contention was that he had been informed by his wife that the deceased raped her and that he killed him on first meeting, there was no error in permitting the State to introduce testimony which rendered it impossible for deceased to have committed such rape at any time claimed by defendant, and that it was unlikely that she had communicated such fact to the defendant and that this contention of the defendant was probably not true; the court properly submitting the issue to the jury and limiting the testimony to the credibility of the witness. Cameron v. State, 439.

Intent. See Carrying Pistol, 1; Deadly Weapon, 3.

The question of defendant's intent does not enter into the case, where the defendant took the pistol apart and carried it around with him to church and other places of public gatherings, and the only excuse was that he did not know it was against the law. Crain v. State, 55.

Internal Revenue License. See Revenue License.

Intoxicating Liquors. See Beer; Indictment; Local Option; Occupation.

Intoxication No Defense.

The mere fact of intoxication at the time of the homicide will not affect the crime nor the degree of murder. Following Clore v. State, 26 Texas Crim. App., 624, and other cases. Lucas v. State, 269.

Invited Error.

1. Where the declarations of defendant applied to the charge of forgery against the defendant and were thus limited by the charge of the court, the contention of defendant that he was not informed that he was also charged with passing a forged instrument are not well taken, and there was no error; besides, the court's charge was invited by a requested charge by defendant. Following Carbough v. State, 49 Texas Crim. Rep., 452. Whorton v. State, 1.

2. Where the charge requested and refused was substantially given in the court's main charge, any error arising therefrom cannot be questioned by the party requesting the charge. Following Cornwell v. State, 61 Texas Crim. Rep., 122, and other cases; besides, the charge was not on the burden of proof. Stewart v. State, 384.

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Invited Error—Continued.

3. Where the court's charge on self-defense was peculiarly applicable to the facts, and a virtual copy of defendant's charge, there was no error. Following Cornwell v. State, 61 Texas Crim. Rep., 122. McKelvey v. State, 538.

Jeopardy. See Former Conviction.

Joint Defendants.

Where, upon trial of murder of joint defendants, there was evidence that one of the defendants did not participate in the homicide, a charge of the court which only authorized an acquittal of either of the defendants in the event that neither acted with implied malice, and which did not segregate the individual intent of each defendant in submitting the law on principals, and without submitting the converse of such proposition, there was reversible error. Jenkins et al. v. State, 585.

Judgment. See Insanity; Reforming Judgment; Verdict, 2.

Judgment of Conviction.

In the absence of a bill of exceptions embracing the judgment and sentence of conviction, this court cannot pass on the question that such judgment was offered in evidence. Perry v. State, 644.

Judicial Knowledge. See Appeal Pending.

1. The courts will take judicial cognizance of the nature and habits of the hog, and the results incident to his keeping and confinement within the limits of the populous portion of a city, and that their keeping may be absolutely prohibited therein under the police regulations of the city. Following Ex parte Glass, 90 S. W. Rep., 1108. Ex Parte Botts, 161.

2. Courts cannot judicially know that prohibition is in force in any given locality in this State; it is, therefore, always necessary to make this proof. Robinson v. State, 496.

Jurisdiction. See Habeas Corpus; District Court, 2; Statutes Construed, 3; Transfer of Indictment.

1. Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, defendant moved to transfer the case from the District Court to the County Court, the motion was properly overruled. Fitch v. State, 58 Texas Crim. Rep., 366, and other cases. Byrd v. State, 35.

2. Where, upon appeal from a conviction of adultery, the record showed that the court below permitted defendant to execute a temporary appeal recognizance and thereupon allowed him within two days after trial to file his motion for new trial, which was then overruled, notice of appeal given and a new recognizance entered into, this court's jurisdiction did not attach by reason of the first recognizance. Brown v. State, 138.

3. It is necessary under the statute that a trial for bail, after indictment found be heard in the county where the homicide occurred and where the indictment is found; and where a district judge had granted a writ of habeas corpus in a case in which there was a change of venue, the writ is returnable to the county in which the indictment was found. Ex Parte Andrus, 183.

4. Where, upon trial of embezzlement, the evidence showed that by agreement between the defendant and the prosecutor, the defendant drew on the prosecutor for the amount of the alleged embezzled money through a bank in the county of the prosecution to which the prosecutor paid the money after receiving a letter from the defendant directing him to do so, and that in fact and in law the defendant received said money in the county of the prosecution, although he was at the time in another county, the jurisdiction of the offense properly attached to the county of the prosecution. Poteet v. State, 322.

5. The Act under which the State Militia, termed National Guard, is organized provides that the State courts shall have jurisdiction of offenses committed by militia men; besides, this is the law exclusive of this statute, in times of peace, and where the District Court first obtained jurisdiction, the same attached throughout. Manley v. State, 502.

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Jurisdiction—Continued.

6. Where defendant was indicted in the District Court for assault with intent to rape and convicted and appealed therefrom to this court, and pending such appeal, by agreement with the county attorney, pleaded guilty, on an agreed statement of facts, to an aggravated assault upon an information filed in the County Court, the jurisdiction of the District Court was thereby not ousted and the county attorney had no authority to make such agreement under Article 63, Code Criminal Procedure, as amended. Following Johnson v. State, 148 S. W. Rep., 300. Taff v. State, 528.

7. Under Section 8, Article 5, Constitution of Texas, and Article 89, Code Criminal Procedure, the District Court has exclusive jurisdiction to try all misdemeanors involving official misconduct. Bolton v. State, 582.

Jurisdiction by Consent.

Parties can not independently of constitutional or statutory provision confer judicial authority upon a special judge, and where this is attempted, a judgment by the appointee is a nullity, and the parties will not be stopped by their consent from denying the jurisdiction. Legislation is suggested. Summerlin v. State, 275.

Jury and Jury Law. See Misconduct of Jury; Talesmen, 1.

1. Where one of the jurors was excused by the State, and the other juror said that the opinion he had formed from hearsay would not influence his verdict, and he was challenged by both the State and the defendant, and no objectionable juror served in the case, there was no error. Byrd v. State, 35.

2. Where the complaint that one of the jurors who tried defendant sat on a previous trial of the case was not reversed by bill of exceptions, and no evidence was introduced, the same can not be considered on appeal. Reeves v. State, 58.

3. Where the question, that the juror was incompetent because he was not a legal resident of the county of the prosecution was raised for the first time in the motion for new trial, the same could not be considered on appeal; besides, defendant accepted the qualification to his bill of exceptions which showed that the juror was a legal resident of said county. Jefferson v. State, 60.

4. In the absence of a bill of exceptions reserved to the formation of the jury or the selection of any member of the jury, the same can not be considered on appeal. Martinez v. State, 280.

5. In the absence of a bill of exceptions, the complaint that the jury were not sworn can not be considered on appeal. Stewart v. State, 384.

6. Where, upon trial of murder, it was shown by the record on appeal that the juror for whom defendant moved to quash the venire was absent from the county and it was impossible to have him brought into court, there was no error in overruling the motion to quash and proceeding with the trial. Following Thuston v. State, 18 Texas Crim. App., 26, and other cases. Cameron v. State, 439.

7. The statute does not require the court to keep together jurors who have been accepted in a felony case less than capital when they have not been sworn to try the case; and to successfully challenge any or all of them, in case they have separated before being sworn, the defendant must affirmatively show that the jurors have been tampered with while thus separated, and because thereof they are not fair and impartial jurors, and that by such tampering, defendant has not had a fair and impartial trial. Overruling Wilcek v. State, 141 S. W. Rep., 88. Davidson, Presiding Judge, dissenting. Jones v. State, 447.

8. Neither side should be permitted to test jurors by showing that they would or would not give credence to the testimony of any witness for either side; besides, the bill of exceptions was defective in not pointing out the error. Ellis v. State, 468.

9. Where counsel for defendant had knowledge of the facts with reference to the expressed opinion of the juror at the time the jury was selected, the contention that the juror had formed and expressed an opinion prior to the trial came too late. Powers v. State, 494.

10. Where seven men had been selected and sworn as jurors, the district attorney, during an intermission, was informed that one of them had formed

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Jury and Jury Law—Continued.
and expressed an opinion to which he called the attention of the court, who retired the other six jurors and investigated the matter, and the juror was then accepted by both parties after the court had stated he would sustain the peremptory challenge, there was no error. McKelvey v. State, 538.

Juxtaposition.

Where criminative facts established are in such close juxtaposition to the main facts as to make them almost equivalent to direct testimony, the court is not required to charge on circumstantial evidence. Laird v. State, 553.

Keeping Disorderly House.

Upon trial of keeping a disorderly house, there was no error in refusing to admit testimony as to other complaints against other parties by the State's witness; the latter being an officer. Johnson v. State, 107.

Keeping Gambling House. See Indictment, 4; Oral Testimony.

Knowledge of Defendant.

Where the evidence showed that defendant, who was charged with throwing a jug through a church window, had knowledge that people were assembled there for the purpose of religious worship, there was no error in refusing a requested charge that if defendant had no notice that people were having religious services there to acquit him. Laird v. State, 553.

Law in Force. See Insufficiency of Evidence; Local Option, 2, 4; Waiver.

1. Where, upon trial of pursuing the occupation of selling intoxicating liquors, in local option territory, it was not shown that local option was in force, the mere fact that the State offered such testimony, but the record did not show that it was introduced, the same was insufficient. Lester v. State, 312.

2. Where the orders of the Commissioner's Court were introduced in evidence, the court could have charged that local option was in force, although he did not assume this in his charge, and there was no error. Following Byrd v. State, 53 Texas Crim. Rep., 507, and other cases. Creed v. State, 464.

3. Where a local option election is not contested within the time specified by law, it becomes effective as a matter of law and when the proof is made that the election has been held, etc., the court can charge as a matter of law that prohibition is in force. Robinson v. State, 496.

Laws. See Codification of Laws.

Leading Questions.

1. Where, upon trial of adultery, the question asked by the State's counsel how long defendant and his paramour lived together was not leading, there was no error; besides, the bill of exceptions was defective. Following Carter v. State, 59 Texas Crim. Rep., 73. Brown v. State, 138.

2. It is always permissible to permit leading questions to be asked to an unwilling witness, etc. Following Carter v. State, 59 Texas Crim. Rep., 73. Wilson v. State, 567.

3. Where the bill of exceptions did not show that a leading question, even if it was one, was not permissible, there was no error. Following Carter v. State, 59 Texas Crim. Rep., 73. Gardington v. State, 595.

Legislation Suggested.

See opinion for suggestions to the Legislature to provide one rule of procedure on appeal applicable alike to all courts and to all cases whether civil or criminal, felony or misdemeanor. Byrd v. State, 35.

Letters. See Date of Offense, 4; Evidence, 11.

1. Where, upon trial of assault to murder, the State introduced a letter written by the defendant to a State's witness about a week after the alleged assault, trying to induce the witness to leave the country, there was no error; besides, the bill of exceptions was defective. Rhodes v. State, 45.

2. Upon trial of fraudulent conversion of a certain check, there was no

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Letters—Continued.
error in admitting in evidence a letter which rendered intelligible defendant's letter and the reply thereto, nor was there any error in admitting defendant's letter to prosecutor. Nesbitt v. State, 374.

3. Where, upon trial of embezzlement, a certain letter would not have been admissible if a proper objection had been raised, but the objection thereto was with reference to the date of the letter, which was immaterial, there was no error. Irby v. State, 619.

Limitation. See Date of Offense, 6; Gaming, 4.

1. Where the indictment alleged that defendant on a given date pursued the business and occupation of selling intoxicating liquors in local option territory, such allegation would admit proof that he was engaged in such occupation within any time prior to the presentment of the indictment within the period of limitation, and in this instance, subsequent to the enactment of the law covering the months charged in the indictment, and it was not necessary to repeat the allegation that he was pursuing such business or occupation each time a sale was alleged to have been made. Davidson, Presiding Judge, dissenting. Byrd v. State, 35.

2. Where the charge of the court authorized the jury, with reference to the question of limitation, to convict for any offense that may have been committed more than three years prior to the time the indictment was presented, the same was error. Todd v. State, 610.

Limiting Testimony. See Rule Stated, 7.

1. Where no necessity is shown and no error is assigned in the court's failure to limit testimony, there is no error. Davis v. State, 86.

2. Where the defendant illicited from the State's witness on cross-examination that he had aided those who tried to have defendant's certificate as a teacher cancelled, etc., for the purpose of affecting his credibility as a witness, it was permissible for the State to show that it was not a wanton and malicious act and to let the witness state the reasons that impelled him to such act, and there was no reversible error in not limiting this testimony. Following Schwartz v. State, 53 Texas Crim. Rep., 449, and other cases. Manley v. State, 169.

3. Where the State only asked questions to lay a predicate to impeach the witnesses, but did not follow it up by offering any testimony, there was no error in the court's failure to limit such questions; besides, the court instructed the jury on the impeaching testimony of other certain witnesses and properly limited the same, and there was no error. Pugh v. State, 357.

4. Where, upon trial of burglary, the evidence showed that a saddle, bridle and blanket were forcibly taken from a certain barn and also a certain gray mare from the lot in which said barn stood, and defendant was found in possession of said mare shortly thereafter, a charge of the court limiting said possession of said mare to the fact as to whether defendant was the party who entered the barn was proper, and not on the weight of the evidence. Stephens v. State, 379.

5. Where testimony could not be legitimately or rationally used for any other purpose than that of impeachment, it is not error to refuse to limit same for that purpose. Following Sue v. State, 52 Texas Crim. Rep., 122, and other cases. Ellis v. State, 468.

6. Where, upon trial of horse theft as an accomplice, the State was permitted to introduce testimony with reference to another theft of a horse prior to the instant case, without objection, and the testimony with reference thereto clearly showed the motive, system, and intent of defendant in committing the theft for which he was on trial, there was no error in the court's failure to specifically limit said testimony to this purpose, no charge being requested by defendant, and the other theft being clearly proven. Bailey v. S., 474.

7. Upon trial of burglary by shooting into a house with intent to injure, there was no error in admitting testimony of previous assaults and assaults and batteries by defendant upon prosecutrix, and such testimony need not be limited in the court's charge, although the court did so limit the same. Following Millican v. State, 63 Texas Crim. Rep., 440, and other cases. Gardington v. State, 595.

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Local Option. See Distinct Offense; Information, 5; Judicial Knowledge; Law in Force; Occupation.

1. Where, upon trial of a violation of the local option law, the evidence was not sufficient to establish a sale, the conviction could not be sustained. Harper, Judge, and Prendergast, Judge, agreeing to reversal upon another ground. Scott v. State, 147.

2. Where, upon trial of a violation of the local option law, there was no evidence that local option was in force, and the defendant requested a charge to find defendant not guilty on this ground, which was refused, the same was reversible error. Galloway v. State, 307.

3. Where, upon trial of a violation of the local option law, the evidence sustained the conviction, there was no error. Ellis v. State, 468.

4. Where the record did not show that local option was in effect in the territory where the alleged violation of the law occurred, the same is reversible error. Green v. State, 550.

Lot. See Verdict by Lot.

Lower Degree of Offense. See Former Conviction, 1.

Lucid Intervals.

1. Where defendant is once adjudged insane under proper proceedings, the presumption is that insanity continues, and the burden is upon the State to show sanity or lucid intervals at the time of the commission of the offense. Witty v. State, 125.

2. Where, upon trial of theft of a horse, the evidence did not raise the question of lucid intervals or partial insanity, but it was contended that defendant was continuously insane throughout his life, there was no error in the court's failure to submit this issue or that the defendant was insane at the time of the trial; especially, as the defendant did not request the court to do so. Lester v. State, 426.

Lunatico Inquirendo.

Where defendant was adjudged insane some time before his trial for murder, and shortly after the commission of the offense, he should have been placed upon trial as to his sanity before he was placed on trial for murder. Following Guagando v. State, 41 Texas, 626. Witty v. State, 125.

Lying in Wait. See Conspiracy, 2.

Malice. See Joint Defendant.

Mandate. See Appeal Pending.

Manslaughter. See Adequate Cause; Insult to Female Relative; Self-defense.

1. Where the evidence did not raise the issue of manslaughter, there was no error in the court's failure to charge thereon. Pace v. State, 27.

2. Where, upon trial of murder, there was evidence that the deceased circulated slanderous statements concerning the defendant of which the latter had notice and thereupon called upon the deceased to retract said statements which the latter refused to do, this in itself was not adequate cause and there was no error in the court's failure to submit this as a cause for manslaughter. Cloud v. State, 76.

3. Where, upon trial of murder, the evidence raised the issue of manslaughter, the court properly submitted that issue to the jury. Blackshear v. State, 113.

4. Where, upon trial of murder, the evidence did not raise the issue of manslaughter, there was no error in the court's failure to charge thereon. Sanches v. State, 134.

5. Where the court's charge on manslaughter was more favorable to defendant than called for by the evidence, when construed as a whole, and his definition of adequate cause was correct, there was no error. Hendricks v. State, 209.

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Manslaughter—Continued.

6. Where, upon trial of murder, the evidence showed that the homicide grew out of certain divorce and injunction proceedings instituted by the wife of the defendant against him, and in which deceased assisted her; that defendant had made different threats at different times on account of this against the deceased, threatening to kill him if he continued meddling with his affairs, and that he finally did kill him for this reason, and there was no evidence which tended to show sudden passion or adequate cause, there was no error in the court's failure to charge on manslaughter. Davidson, Presiding Judge, dissenting. Following Redman v. State, 52 Texas Crim. Rep., 591. Powdrill v. State, 340.

7. Where, upon trial of murder, the court's charge on manslaughter, when taken as a whole, was correct and applicable to the facts, there was no error, the court also applying the reasonable doubt between murder and manslaughter. Cameron v. State, 439.

8. Where defendant had been acquitted at a former trial of both degrees of murder, the court correctly charged upon manslaughter. Green v. State, 485.

9. Where, upon trial of murder, the court's charge on manslaughter was strictly applicable to the facts in evidence, there was no error. Salmon v. State, 506.

10. Where, upon trial of murder, the defendant was convicted of manslaughter, receiving the lowest penalty, the charge on murder need not be considered and that on manslaughter, although slightly inaccurate, was not cause for reversal. Condron v. State, 513.

11. Where, upon trial of murder, the court submitted a charge on manslaughter as well as one on self-defense, and the evidence showed that the homicide grew out of an attempted arrest by the deceased and his deputy who were sheriffs, and the court correctly drew the line of distinction as to when the acts of deceased in attempting the arrest of defendant would reduce the offense to manslaughter and when such acts would justify the killing in self-defense, there was no conflict in the said two paragraphs of the court's charge as contended by the defendant. Davidson, Presiding Judge, dissenting. Id.

12. Where, upon trial of murder, defendant was convicted of manslaughter, which was sustained by the evidence, there was no error on that ground. Hysaw v. State, 562.

13. Where, upon trial of murder, the evidence showed that the killing occurred after the first meeting, but the court, nevertheless, charged on manslaughter and adequate cause, the defendant had no ground to complain, and the contention that the charge of the court used the words, "sudden passion," is without merit. Simmons v. State, 624.

14. Where, upon trial of murder and a conviction of manslaughter, the evidence supported even a higher grade of the offense, while defendant's testimony showed justifiable homicide, the conviction is sustained. Bogue v. State, 656.

Map. See Dedication of Street.

Marriage. See Former Marriage.

Matters Occurring After Trial.

This court can not consider affidavits concerning matters occurring since the trial, and can only look to the record made on the trial of the case from which the appeal is prosecuted; besides, the question of former jeopardy set up in these affidavits could not apply. Boseley v. State, 100.

Mental Condition of Defendant.

Where rejected testimony as to the mental condition of defendant was clearly no part of the res gestae, there was no error. Mayhew v. State, 187.

Medical Practice Act. See Constitutional Law.

Medicine. See Illegal Practice of Medicine.

Militia. See National Guard.

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Misconduct of Jury.

1. Where the bills of exception, concerning the misconduct of the jury alluding to defendant's failure to testify, were signed by the trial judge about sixty days after the adjournment of the court and were to the overruling of the motion for new trial and not to the introduction of testimony, there was no reversible error; besides, the testimony, if considered, did not show such misconduct of the jury as to require a reversal. Rhodes v. State, 45.

2. Where the testimony concerning the want of qualifications of a juror was filed after adjournment of court, the same can not be considered on appeal; besides, the court did not err in overruling a motion for new trial on this ground. Cloud v. State, 76.

3. Where, upon trial of aggravated assault, the alleged misconduct of the jury was not of such character as to have injured the rights of defendant, under the facts and the charge of the court, there was no reversible error. Fletcher v. State, 135.

4. In the absence of a statement of facts, the ground in the motion for new trial complaining of the misconduct of the jury could not be considered, especially, where same was filed after adjournment of court. Following Probest v. State, 60 Texas Crim. Rep., 608. Maxwell v. State, 248.

5. Where the statement of facts, on the motion for new trial attacking the verdict of the jury for misconduct of the jury, was filed after the adjournment of the trial court, the same could not be considered on appeal; besides, the record showed that there was no such misconduct. Following Knight v. State, 64 Texas Crim. Rep., 541, 144 S. W. Rep., 967, and other cases. Lucas v. State, 269.

6. Where the question of the misconduct of the jury was examined into by the trial court and decided adversely to defendant, and there appeared in the record on appeal no evidence, the presumption is that the trial court correctly ruled thereon. Poteet v. State, 322.

7. Where, upon trial of murder and a conviction of manslaughter, the jury not only discussed the former conviction of defendant, but went so far as to discuss the term of years assessed against him, all of which evidently resulted in his conviction, there was reversible error; the result of the former trial not being in evidence, and of course, inadmissible. Clements v. State, 369.

8. Where the ground of the motion for new trial alleged misconduct of the jury, but no supporting affidavits were attached, the same could not be considered on appeal. Serop v. State, 399.

9. Under the uniform holding of this court, a statement of facts concerning the misconduct of the jury which is filed after the adjournment of court can not be considered; besides, there was not error in overruling defendant's motion for new trial on this ground. Following Knight v. State, 64 Texas Crim. Rep., 541. Decker v. State, 410.

10. Where, upon trial of theft of cattle, the separation of one of the jurors from the other eleven jurors was not such as could have injured the defendant's rights in any way, there was no reversible error. Webb v. State, 413.

11. When extrinsic matters are set up in a motion for new trial, they must be supported by affidavit. Following Barber v. State, 35 Texas Crim. Rep., 70. Bryant v. State, 457.

12. A mere incidental reference in the jury room to the failure of defendant to testify is not a cause for reversal. Powers v. State, 494.

Misconduct of Officer. See Official Misconduct.

Misdemeanor. See Former Conviction, 3.

1. Where there are two theories made by the evidence, one by the State, that the alleged stolen property was over the value of $50, and one by the defendant that it was under the value of $50, the failure of the court to submit misdemeanor theft or the receiving of property under the value of $50 was reversible error. Williams v. State, 163.

2. In misdemeanor cases, the trial court is without authority to authorize the filing of bills of exception after twenty days from the adjournment of the court. Following Misso v. State, 61 Texas Crim. Rep., 241, 135 S. W. Rep., 1173, and other cases. DeFriend v. State, 329.

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Misdemeanor—Continued.

3. In the absence of bills of exception to the court's action in refusing special charges in misdemeanor cases, where the conviction is justified by the information or the facts, this court can not review the matter. Carpenter v. State, 331.

4. Where, upon trial of embezzlement, the evidence showed that the defendant embezzled money over the value of $50 at one time within the time alleged in the indictment, there was no error in the court's failure to submit a charge on misdemeanor embezzlement. Irby v. State, 619.

5. In the absence of bills of exception to the ruling of the court in misdemeanor cases, the grounds in the motion for new trial can not be considered on appeal. Following Basquez v. State, 56 Texas Crim. Rep., 329. Nickerson v. State, 659.

Mistake. See Theory of State.

Mistake of Fact. See Statutes Construed, 4.

Money. See Indictment, 5, 16.

Monogram. See Embezzlement.

Moonlight. See Almanac.

Moral Turpitude. See Husband and Wife, 5.

1. Upon trial of murder, there was no error in admitting testimony that the defendant had served a term in the penitentiary; it not appearing that it was too remote. Simpson v. State, 376.

2. It is always permissible to impeach a witness by showing that he has been indicted or is then under indictment for a felony, and the court correctly refused a special charge to the contrary. Ellis v. State, 468.

More Than One Assailant.

Where, upon trial of murder, defendant's own testimony showed that he did not fear an assault from deceased's companion, he calling to the latter to get out of the way, and precluded the idea that defendant was in any danger from the latter or that he thought he was, there was no error in the court's refusal of defendant's requested charge to instruct the jury that if it reasonably appeared to defendant that deceased or his said companion was about to shoot defendant, he would be justified in slaying deceased. Holmes v. State, 588.

Motion for New Trial. See Attorney and Client; General Objections; Jurisdiction, 2; Newly Discovered Evidence; Plea of Guilty.

1. In the absence of bills of exception to the introduction of testimony, complaints in the motion for new trial on this ground and a bill of exceptions to the overruling of the motion does not raise the question in such way as to be reviewed. Davis v. State, 86.

2. Upon trial of murder, there was no error in permitting the State to cross-examine defendant's witness to show motive on the part of defendant, and also the acts of defendant and other parties immediately preceding the homicide. Mayhew v. State, 187.

3. Where the motion for new trial was based on many grounds, and appellant's bill of exceptions was to the court's action overruling said motion, the same can not be considered on appeal. Wingate v. State, 234.

4. Where appellant, in his brief, complained that the court did not present defendant's defense affirmatively, but no such objection was placed in the motion for new trial, the same could not be considered on appeal, and there was no error under Article 723, Code Criminal Procedure. Following Joseph v. State, 59 Texas Crim. Rep., 82, and other cases. Stewart v. State, 384.

5. An objection that the court erred in paragraph one of the charge in defining the offense of theft, and in refusing to give defendant's special charge is too general to be considered on appeal; besides, when considered, there was no error. Following Sue v. State, 52 Texas Crim. Rep., 122, and other cases. Bryant v. State, 457.

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Motion to Strike Out.

Where no bill of exceptions, to the motion to strike out testimony, was reserved at the time to the court's ruling in refusing to do so, there is nothing to review; besides, there was no error in refusing to do so. Pugh v. State, 357.

Motive. See Former Difficulty; Papers in Civil Suits, 2.

1. Upon trial of murder, there was no error in admitting in evidence the threats of the defendant against the deceased made at different times, and this, although a partial reconciliation had occurred between defendant and deceased since these threats were made. Following Leech v. State, 63 Texas Crim. Rep., 339. Powdrill v. State, 340.

2. Where, upon trial of murder, it was shown that the defendant immediately after his wife was stabbed, returned to her body and kicked it, using abusive language, the same was admissible to show the animus, motive, and ill-will of defendant toward deceased, and there was no error in the court's failure to limit said testimony. Following Davis v. State, 65 Texas Crim. Rep., 271, 143 S. W. Rep., 1161. Davis v. State, 420.

3. Where, upon trial of murder, it appeared that all the testimony admitted was necessary to render intelligible that part of it as to what defendant said about killing deceased, there was no error, and the remark of the court when the objection thereto was made could not have been hurtful to the defendant. Bogue v. State, 656.

Murder. See Charge of Court; Corpus Delicti; Declarations and Acts of Deceased; Evidence; Former Difficulty; Ill-Will; Insult to Female Relative; Joint Defendant; Motive; Officer's Right to Arrest; Res Gestae Statements; Self-defense; Sufficiency of Evidence; Threats.

1. Where, upon trial of murder, the court admitted the testimony as to defendant's threats to the effect that he would kill anybody who killed his hogs, and the same in connection with other testimony individuated the deceased as the person of whom defendant was speaking, there was no error; the court excluding other parts of the declarations which were not admissible. Following Pace v. State, 58 Texas Crim. Rep., 90. Pace v. State, 27.

2. Where, upon trial of murder, the evidence raised the issue of murder in both degrees, there was no error in charging the jury as to the two degrees of murder. Cloud v. State, 76.

3. Where, upon trial of murder and a conviction of manslaughter, the evidence sustained the conviction, there was no error. Spencer v. State, 92.

4. Where, upon trial of murder in the second degree and conviction thereof, the evidence sustained the conviction, there was no error. Boseley v. State, 100.

5. Where, upon trial of murder, a conviction of murder in the first degree was sustained by the evidence under a proper charge of the court, there was no error. Sanches v. State, 134.

6. Where, upon trial of murder, the evidence sustained the conviction of murder in the second degree, there was no reversible error, although the jury might have reached a different verdict. Hendricks v. State, 209.

7. Where the court submitted the issues of manslaughter and self-defense and submitted a charge on murder in the second degree, which has often been approved by this court, there was no error and it is wholly unnecessary to define in the latter the words, "tend to mitigate, excuse or justify the act." Id.

8. Where, upon trial of murder, the evidence supported the conviction of that count in the indictment which charged the defendant with killing deceased by beating and bruising her with a weapon the name, character and description of which was to the grand jury unknown, there was no error on this ground. Lucas v. State, 269.

9. Where, upon trial of murder, the court, according to the facts, submitted the different degrees of murder and cooling time and properly limited the testimony with reference to a former difficulty, there was no error. Powdrill v. State, 340.

10. Where, upon trial of murder, the defendant was convicted of murder in the second degree, which was sustained by the evidence, and the charge of the court, there was no reversible error. Pugh v. State, 357.

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Murder—Continued.

11. Where, upon trial of murder, the evidence sufficiently sustained the conviction under a proper charge of the court, there was no error. Decker v. State, 410.

12. Where, upon trial for murder, the defendant contended that the wound upon his wife was either self-inflicted or accidental, but the evidence indicated that defendant inflicted the wound and that it would be almost a miracle to have been self-inflicted or accidental, the conviction was sustained. Davis v. State, 420.

13. Where, upon trial of murder and a conviction of murder in the second degree, the evidence sustained the conviction, there was no error. Garrett v. State, 462.

14. Where, upon trial of murder, the defendant was convicted of murder in the second degree, which was sustained by the evidence under a proper charge of the court, when considered as a whole, there was no error. Manley v. State, 502.

15. Where, upon trial of murder, the court's charge on self-defense presented every phase as made by the evidence and when read as a whole, is not subject to any criticisms, there was no reversible error. Condron v. State, 513.

16. Where, upon trial of murder, the evidence sustained a conviction of murder in the first degree, there was no error. Christie v. State, 598.

17. Where the evidence raised the issue of murder in both degrees, it was proper for the court to charge thereon in the proper form. Following Barton v. State, 53 Texas Crim. Rep., 443, and other cases. Simmons v. State, 624.

Murder in First Degree. See Murder.

1. Where defendant was convicted of murder in the second degree, the court's charge on murder in the first degree need not be considered on appeal; however, the charge was correct. Hendricks v. State, 209.

2. Where, upon trial of murder, the court's charge on murder in the first degree was in accordance with approved precedent and not on the weight of the evidence, there was no error. Following Alexander v. State, 40 Texas Crim. Rep., 395. Cameron v. State, 439.

3. Where, upon trial of murder, the evidence raised the issue of murder in the first degree, the court correctly submitted the same to the jury. Peters v. State, 561.

Murder in Second Degree. See Murder.

Name of Defendant.

Where defendant was indicted under the name of A. L. Pierce and on trial suggested his name was A. L. Peters, and the same was corrected in accordance with his suggestion, there was no error. Peters v. State, 403.

Name of Injured Party.

1. Where the name of the party injured was alleged to be A. Dodson, Jr., the proof showed his name to be A. Dodson, there was no variance. Peters v. State, 403.

2. Where the allegation of the party injured was such that it could not mislead anyone, and that the use of another name which had no connection with the transaction was clearly a clerical error and could not vitiate the indictment, there was no error in overruling a motion to quash. Following Bailey v. State, 63 Texas Crim. Rep., 584. Skinner v. S., 488.

Name of Juror. See Idem Sonans.

Names of Persons Under Treatment.

Upon trial of unlawfully practicing medicine without license for pay, there was no error in introducing numerous witnesses for the State who stated that they had been treated by defendant for various ailments and diseases, although they were not named in the indictment. Mueller v. State, 158.

Names of Witnesses.

Where defendant complained that the names of the witnesses did not appear on the indictment, but defendant was furnished with said names before he announced, there was no error. Polk v. State, 53.

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National Guard. See Jurisdiction, 5.

Where it was admitted by the State that the call for the militia was regular and made by proper authority, and that defendant was legally at the place where the difficulty occurred, there was no error in excluding other testimony of this character. Manley v. State, 502.

Necessary Force.

Where the court's charge on self-defense submitted a general definition on self-defense, limiting the defendant to necessary and reasonable force to defend himself, but in applying the law to the facts, correctly applied the same, there was no reversible error; although, in a case of this kind, this character of charge should not be given. Holmes v. State, 588.

Negligent Homicide. See Self-defense, 10.

Where the evidence did not raise the issue of negligent homicide, there was no error in the court's failure to charge thereon. Blackshear v. State, 113.

Newly Discovered Evidence. See Attorney and Client, 2.

1. While it is public policy to forbid new trials for the purpose of admitting cumulative testimony, yet, where newly discovered testimony is of such cogency and force that it may properly show that an innocent man has been convicted, a new trial should be granted. Spencer v. State, 92.

2. Where the judgment is reversed and the cause remanded upon other grounds, the question of newly discovered evidence need not be considered. Baggett v. State, 145.

3. Where the motion for new trial was supported by affidavits made before appellant's counsel as notary public with reference to newly discovered evidence, the same could not be considered on appeal; besides, the alleged newly discovered evidence was known to or could have been known by defendant and his counsel before trial. Cuellar v. State, 155.

4. Where the motion for new trial showed a want of diligence in not procuring the alleged newly discovered evidence on the trial of the case, there was no error. Bellew v. State, 363.

5. Where the cause is reversed and remanded on other grounds, the question of newly discovered evidence need not be considered. Clements v. State, 369.

6. Where, upon trial of theft of mules under bailment, the conviction was amply supported by defendant's confession and other testimony, there was no error in overruling a motion for new trial on the ground of newly discovered evidence, where the record showed a want of diligence to obtain this testimony and that besides, it was not probably true. Peck v. State, 490.

7. Where no affidavits were attached to the motion for new trial on account of newly discovered evidence, the same can not be considered on appeal; besides, the contention that prosecutrix was of loose morals before coming into the State was no defense to the offense of pandering. McDowell v. State, 545.

8. Where the alleged newly discovered evidence was not of that character which authorized a new trial and the motion was not supported by affidavit, there was no error. Laird v. State, 553.

9. In the absence of a statement of facts, a refusal to grant a continuance and new trial on account of the newly discovered evidence, can not be considered on appeal. Kelly v. State, 618.

10. Where two are jointly indicted and one is tried and convicted and subsequently the other is tried and acquitted, a new trial will be granted the former to obtain the testimony of the latter, where it appears that the new evidence is legal and competent and material to his defense. Following Rucker v. State, 7 Texas Crim. App., 549, and other cases. Clark v. State, 642.

New Trial.

Where defendant was convicted of manslaughter, and the brother of the defendant testified during the trial that he and not his brother fired the shot at the deceased, and after conviction, it was shown by affidavit of a disinterested witness that this testimony was true, but had been wilfully with-

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New Trial—Continued.
held from the knowledge of the defendant and his counsel until after trial, a new trial should have been granted, although such newly discovered evidence was mainly cumulative. Spencer v. State, 92.

Ninety Days' Limit.

1. Under no construction can it be held that the Legislature intended to grant more than ninety days in which to file a statement of facts in the trial court, and where such statement was filed one hundred and five days after the adjournment of the trial court, the same can not be considered on appeal. Maxwell v. State, 248.

2. Where the statement of facts and bills of exception were filed four months and one day subsequent to the adjournment of the trial court, the same cannot be considered on appeal, and this, although the attorneys representing them on the trial abandoned the case and other attorneys were employed, no sufficient reason being shown why diligence was not used by the defendant to file said statement of facts and bills of exceptions within ninety days from adjournment of court. Martinez v. State, 280.

Non-expert Testimony.

Where, upon trial of murder, it was not shown by the witnesses that they knew enough of the traits of life and disposition and other matters as to defendant's sanity to place them in the attitude to say whether he knew right from wrong, or to express an intelligent conclusion as to his sanity, their opinion as to his sanity is inadmissible. Following Jordan v. State, 141 S. W. Rep., 786. Witty v. State, 125.

No Repeal. See Statutes Construed, 6.

Notice. See Repeal.

Number of Sales.

1. Where the court in his charge instructed the jury that two sales must be proved to have been made within two years instead of three years, in defining as to what constituted pursuing the occupation of selling liquor in local option territory, such error was harmless, the charge being otherwise correct. Pierce v. State, 175.

2. Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the indictment alleged four separate and distinct sales, the contention that the proof must show each of such sales is untenable, as it is only necessary to prove two. Misher v. State, 223.

Oath of Office.

A special judge who is otherwise legally appointed or selected must take the oath of office in order to justify his sitting in the case trying it. Summerlin v. State, 275.

Objections.

1. That the verdict and judgment are contrary to the law and the evidence is too general an objection, unless the evidence is insufficient to sustain the verdict, which it is not. Martinez v. State, 280.

2. Where the record showed that no exceptions to the testimony were reserved, there is nothing to review on appeal. Simpson v. State, 376.

Objection to Charge of Court.

The Court of Criminal Appeals, as the law now stands, can not consider complaints of the charge of the court nor the failure to give the special charges requested, unless the same are pointed out and reserved as the law directs, or unless fundamental error is presented. Byrd v. State, 35.

Obstructing Public Road.

Where the obstruction was not placed in the public road, but on a passage way adjoining the same, the conviction could not be sustained. Jones v. State, 232.

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Occupation. See Charge of Court, 12; Distinct Offense; Indictment, 3; Jurisdiction, 1; Law in Force; Number of Sales; Plea of Guilty; Other Sales; Pursuing Occupation.

1. Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the evidence sustained the conviction, there was no error. Byrd v. State, 35.

2. Where no part of the court's charge authorized the jury to convict defendant of pursuing the business or occupation of making one sale of intoxicating liquors in local territory, but on the whole, instructed the jury that they must find that defendant was engaged in the business or occupation and made at least two sales, there was no error, although the definition of occupation might have been fuller; yet, no charge was requested. Pierce v. State. 175.

3. Where the court instructed the jury that in order to constitute the occupation of selling intoxicating liquors, etc., it is meant that which occupied a part of the attention and time of the defendant as a business or calling and which he pursued for the purpose of profit and gain, and that he made at least two sales prior to the filing of the indictment, the same was sufficient and not on the weight of the evidence. Misher v. State, 223.

4. Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the evidence did not show that the defendant sold such liquors to the parties alleged in the indictment, and did not show that local option was in force, and the court did not charge the law of the case, the conviction could not be sustained. Lester v. State, 312.

5. Where the court's definition of the word, "occupation," was according to approved precedent, there was no error in refusing requested charges which were not applicable. Following Fitch v. State, 58 Texas Crim. Rep., 236, and other cases. Creed v. State, 464.

6. Where, upon trial for unlawfully pursuing the occupation of selling intoxicating liquors in local option territory, the evidence clearly justified the jury in believing that the so-called lunches attended with the ordering of beer, etc., were a mere subterfuge, and that more than two sales of intoxicating liquors and the pursuing by defendant of such occupation was amply proved, the conviction was sustained. Wilson v. State, 567.

Office. See Oath of Office.

Officer. See Aggravated Assault, 10.

Officer's Right to Arrest.

Where, upon trial of murder, the evidence showed that shortly before the homicide the defendant had a difficulty with a third party, during which he reached for his pistol and fired it, and a warrant was placed in the hands of the deceased, who was sheriff, and his deputy for the arrest of defendant for carrying a pistol, and who approached him with said warrant to arrest him, when the difficulty arose in which deceased was killed by defendant's companion, there was no error in the court's charge that if defendant was unlawfully carrying a pistol that he was subject to arrest by deceased or any of his deputies, and such charge did not assume the fact that the defendant was carrying a pistol and was proper under the law and facts of the case. Article 479, Penal Code. Following Jacobs v. State, 28 Texas Crim. App., 79, and other cases. Davidson, Presiding Judge, dissenting. Condron v. State, 513.

Official Court Stenographer.

The Legislature has made a distinction between statement of facts and the filing of same where there is an official court stenographer and where there is not; and also in felony cases, where there is an official court stenographer, and in misdemeanor cases in the County Court where there is not such stenographer. Durham v. State, 71.

Official Misconduct. See Jurisdiction, 7.

Both under the statutory and common law definition, official misconduct includes the failure to perform any and all acts required by law to be performed by such officer. Bolton v. State, 582.

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Opinion of Juror. See Jury and Jury Law, 9.

Where, upon appeal, the bill of exceptions showed that defendant's claim that the juror had a formed opinion was not supported, but was shown that the juror was qualified, there was no error; besides, the juror was peremptorily challenged and did not sit on the case. Following Duke v. State, 61 Texas Crim. Rep., 441, and other cases. Ellis v. State, 468.

Opinion of Witness.

1. The opinion of a witness that someone else than defendant might be the father of the child of the prosecuting witness was inadmissible. Vickers v. State, 628.

2. Upon trial of robbery, there was no error in permitting the State's witness who was alleged to have been robbed to testify that in his opinion defendant was one of the men who committed the robbery. Following Coffman v. State, 51 Texas Crim. Rep., 478, and other cases. Perry v. State, 644.

Oral Testimony.

Upon trial of keeping a gambling house, there was no error in admitting oral testimony that defendant was the president of the club that had control of the alleged house. Polk v. State, 53.

Order Concerning Term of Court.

Even if it be conceded, and the orders of the district judge could be construed to mean, that said special term of the District Court so called and convened was intended to be a part of the regular term of said court, it could have no such effect as to render the term of the court illegal and would not be a regular term of the court, but a special term. Davidson, Presiding Judge, dissenting. Mayhew v. State, 187.

Order of Commissioners' Court. See Waiver.

Ordinary Diligence. See Receiving Stolen Property.

Ordinary Language Employed. See Statutes Construed, 1.

Original Taking.

Where, upon trial of theft, there was evidence that the defendant purchased the alleged stolen property, he could not be guilty as principal, although he may have actually known that the property was stolen, and the court's failure to charge upon the issue of purchase was reversible error. Jones v. State, 497.

Other Acts of Intercourse.

It is the settled law of this State now that the State is not confined to the first act of sexual intercourse in seduction cases, but that subsequent acts of intercourse may be shown. Following Battles v. State, 63 Texas Crim. Rep., 147, and other cases. Walls v. State, 317.

Other Offenses. See Accomplice, 6; Vagrancy; Witness.

1. Where it was not shown that another theft was connected with the theft for which defendant was being prosecuted as receiving the property stolen, but the two transactions were independent of each other, and this evidence was not properly limited, the same was reversible error. Forrester v. State, 62.

2. Upon trial of vagrancy, it was error to admit testimony that the party, about whose place defendant was loitering, had no license to sell intoxicating liquors; there being no connection shown between the two offenses. Davis v. State, 251.

3. Where defendant was on trial and convicted alone for the offense charged in the indictment, and could not have been convicted for any other offense, and the evidence concerning the other offense was admitted alone for the purpose of showing motive, system and intent for the theft upon which he was on trial as an accomplice, there was no error in the court's failure to limit the testimony to the purpose for which it was introduced. Bailey v. State, 474.

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Other Sales.

1. Where the indictment charged defendant with pursuing the business or occupation of selling intoxicating liquors in local option territory on a certain date, there was no error in admitting testimony of sales of whisky on dates other than the dates named in the indictment. Byrd v. State, 35.

2. Upon trial of pursuing the business or occupation of selling intoxicating liquors in local option territory, testimony of any and all sales made by defendant was admissible as a circumstance going to show that he was engaged in said business. Following Robinson v. State, 66 Texas Crim. Rep., 392, 147 S. W. Rep., 245, and other cases. Misher v. State, 223.

3. Upon trial of unlawfully engaging in the occupation of selling intoxicating liquors in local option territory, there was no error in admitting evidence of other sales than those specifically alleged in the indictment. Wilson v. State, 567.

Other Testimony Showing Same Fact.

Where the evidence was admissible under the qualifications of the bills of exception, there was no error; besides, the same facts were shown on cross-examination and by other witnesses. Taff v. State, 528.

Other Transactions. See Keeping Disorderly House; Res Gestae, 5.

1. Upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, there was no error of admitting testimony of large shipments of intoxicating liquor about this time to the defendant. Byrd v. State, 35.

2. Where, upon trial of bribing a witness, the State was permitted to introduce all the details of a seduction case to show that defendant had bribed the father of the alleged seduced female and induced him and his daughter by a bribe to leave the county in order to avoid testifying in the case, the same was reversible error, defendant not being present and had nothing to do with the seduction. Harrison v. State, 152.

3. Where, upon trial of a violation of the local option law, there was evidence that intoxicating liquors were found on the premises controlled by defendant and claimed by him, and the court charged the jury that this testimony could only be used for the purpose of showing the intent of the defendant to commit the offense, the same was a charge on the weight of the evidence and reversible error in ascribing it to the purpose of proving intent of defendant. Following Rice v. State, 49 Texas Crim. Rep., 569, and other cases. Stewart v. State, 337.

4. Where, upon trial of burglary, the evidence showed that at the time of the taking of the alleged stolen property from the burglarized barn, a certain horse was taken, which was found in defendant's possession shortly thereafter, the same was an incriminating circumstance which was admissible in evidence. Stephens v. State, 379.

5. Where, upon trial for burglary, the evidence showed that a barn was forcibly entered and a saddle, bridle and blanket taken therefrom, and at the same time a horse was taken out of the lot, which latter was found in defendant's possession, there was no error in refusing a requested charge to disregard all testimony as to defendant's possession of said horse. Id.

6. Upon trial of robbery, there was no error in admitting testimony that another person was robbed at the same time and place as the one alleged in the indictment, and no charge in relation thereto was called for. Serop v. State, 399.

Outcry.

Upon trial of assault with intent to rape, there was no error in admitting testimony that the prosecutrix a few minutes after the assault upon her ran out of the house and stated that defendant made an assault upon her and asked what to do, and that they phoned to an officer. Fuller v. State, 534.

Ownership. See Unrecorded Brand.

1. Where, upon trial of theft, the ownership was alleged in the wife, and the property was community and in the actual possession of the wife at the

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Ownership—Continued.
time it was stolen, there was no error under Article 457, Code Criminal Procedure. Lane v. State, 65.

2. Where the information charged the ownership of the automobile from which a generator was taken to be in the owner of the automobile who had the same in a garage owned by another who had the mere custody of the automobile, the ownership was correctly alleged. Following Thomas v. State, 1 Texas Crim. App., 289, and other cases. Staha v. State, 340.

Pandering.

Where, upon trial of pandering and procuring a woman to come to this State for the purpose of prostitution, the evidence sustained the conviction, there was no error. McDowell v. State, 545.

Papers in Civil Suit.

1. Where the bill of exceptions did not include the petition for divorce, which defendant desired to introduce, the question can not be reviewed; besides, there was no error in excluding it. Following Fifer v. State, 64 Tex. Crim. Rep., 203, 141 S. W. Rep., 989. Martinez v. State, 280.

2. Where, upon trial of murder, it developed that the homicide grew out of divorce and injunction proceedings which the wife of the defendant had instituted against him, and in which her son, the deceased, supported her, there was no error in admitting in evidence so much of the proceedings in the civil suit which explained the transactions without introducing the details thereof. Davidson, Presiding Judge, dissenting. Powdrill v. State, 340.

Pandering. See Indictment, 27.

Pardon. See Convict.

Upon trial of robbery, there was no error in the ruling of the court below that a conviction of a State's witness could not be proved orally, but that the judgment of conviction is the best evidence. Perry v. State, 644.

Partnership.

Where, upon trial of embezzlement, there was slight evidence of partnership between defendant and prosecutor and the court submitted the issue to the jury, who found adversely to defendant thereon, there was no error. Poteet v. State, 322.

Passage of Law. See Date of Offense, 1.

Passing Forged Instrument. See Invited Error, 1.

Penalty.

Where, upon trial of assault with intent to rob, the jury fixed the highest penalty for this offense and the evidence supported the verdict, there was no error. Wingate v. State, 234.

Peremptory Charge to Acquit.

Where, upon trial of aggravated assault, the evidence sustained the conviction, there was no error in the court's failure to submit a peremptory charge to acquit. Nickerson v. State, 659.

Perjury. See Indictment, 17.

Permanent Removal. See Reproduction of Testimony, 1.

Permitting Jury to Take Papers.

Upon trial of theft of cattle, there was no error in permitting the jury to carry with them certain papers in evidence when they retired to consider their verdict; besides, the bill of exceptions did not point out any injury to defendant. Webb v. State, 413.

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Physical Examination.

Upon trial of aggravated assault where the evidence showed that the prosecuting witness was severely whipped with switches, there was no error in introducing testimony of a physical examination of said witness, within two or three days after said assault, to show the condition of his body. Caples v. State, 394.

Pistol. See Carrying Pistol.

Playing Dice. See Private Residence, 3.

Pleading. See Murder, 8.

Plea of Guilty. See Withdrawal of.

Where defendant contended that he did not know in entering his plea of guilty that he was charged with pursuing the occupation of selling intoxicating liquors in local option territory which was contested by the State, and the court heard testimony as to this issue on defendant's motion for new trial and found against him, there was no reversible error. Alexander v. State, 23.

Plea of Not Guilty.

Under Article 938, Code Crim. Proc. as amended, this court must presume that the defendant was arraigned and pleaded to the indictment, unless such issue is raised in the court below by proper bills of exception, and therefore, a contention that the judgment did not show that the defendants entered a plea of not guilty cannot be considered; besides, the record showed that such plea was made, and the improper use of an apostrophe is entirely too technical. Martinez v. State, 280.

Police Power. See City Charter and Ordinance; Judicial Knowledge.

Policy Games. See Indictment, 21.

Possession of Property Recently Stolen. See Recent Possession.

Posting Enclosures.

The law of 1903 provided that one who shall hunt within the enclosed lands of another containing less than two thousand acres without the consent of the owners shall be punished, while one who shall hunt within the enclosed lands of another containing more than two thousand acres, etc., shall also be punished; the distinction being that in enclosed lands of less than two thousand acres, the lands need not be posted, while in enclosures of two thousand acres or more, they must be posted. Berry v. State, 602.

Postponement. See Bribing Witness; Continuance.

Practice in District and County Courts. See Discretion of Court, 2; Lunatico Inquirendo; Permitting Jury to Take Papers.

1. Where defendant had sought to impeach the State's witness, there was no error to admit testimony in support of the witness, and this can be done at any time before the argument is concluded, under Article 698, Code Criminal Procedure. Pierce v. State, 175.

2. Where the court refused to require the State to place all eyewitnesses on the stand, but on his own motion, called a witness on the stand and tendered him to both parties who examined him rigidly, there was no error; besides, the State did not wholly rely on circumstantial evidence, but introduced an eyewitness to the transaction. Qualifying Hunnicutt v. State, 20 Texas Crim. App., 632; Thompson v. State, 30 Texas Crim. App., 325. Following Reyons v. State, 33 Texas Crim. Rep., 143, and other cases. Pugh v. State, 357.

3. If defendant expected to illicit any expert testimony, he should have so informed the court at the time, and it was too late to do so after the verdict had been rendered. Davis v. State, 420.

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Practice on Appeal. See Argument of Counsel; Assignment of Error; Former Decision; General Objections; Jury and Jury Law; Matters Occurring After Trial; Misconduct of Jury, 9; Motion for New Trial; Objections; Objections to Charge of Court; Plea of Not Guilty; Presumption, 3; Reforming Judgment; Statement of Facts; Theft of Mules, 2; Transcript, 2; Venue.

1. Where defendant was indicted for forgery and passing a forged instrument, but tried and convicted of forgery, objections relating to the charges of the court as applied to passing a forged instrument need not be considered. Whorton v. State, 1.

2. The rule in criminal cases under Article 743, Code Criminal Procedure, provides that no criminal case shall be reversed on account of error in the charge of the court, unless the charge is excepted to at the time of the trial or in the motion for new trial and the error pointed out, and shall not be regarded as excepted to as in civil cases. Byrd v. State, 35.

3. In the absence of a statement of facts, the sufficiency of the evidence and the rejection and admission of testimony and the charge of the court cannot be considered. Johnson v. State, 123.

4. It is too late to raise objections to the admission of testimony for the first time in the motion for new trial; besides, the testimony that defendant's paramour was a prostitute was admissible. Brown v. State, 138.

5. Where, upon appeal from a conviction of unlawfully practicing medicine, the questions raised had been discussed and decided adversely to appellant in numerous cases, it was not necessary to pass on them again. Following Ex parte Collins, 57 Texas Crim. Rep., 2. Mueller v. State, 158.

6. Where the objections to the court's charge are not presented by bill of exceptions or motion for new trial, they need not be considered on appeal. Powers v. State, 214.

7. Where the motion for rehearing pointed out errors in the statement of the facts in the original opinion which could not change the result, there was no error in overruling same on this ground. Wingate v. State, 234.

8. In the absence of a statement of facts, the rule is if the charge of the court is applicable to any state of facts, provable under the indictment, the presumption is that the court charged the law and all the law called for under the testimony. Maxwell v. State, 248.

9. Where all the questions raised by bills of exception and motion for new trial were decided adversely to appellant in a companion case, they need not be again considered. Gould v. State, 250.

10. Where errors are attempted to be pointed out for the first time in this court in the assignments of error and in the brief, they cannot be considered on appeal. Art. 743, C. C. P. Martinez v. State, 280.

11. Where, upon appeal, the bills of exception did not set out the proceedings in the court below sufficiently to enable this court to know whether an error had been committed in the admission of certain testimony, the same cannot be considered. Harrison v. State, 291.

12. Where, upon trial of seduction, the evidence sustained the conviction under a full and fair charge of the court, there was no error, and general objections to the charge of the court cannot be considered. Walls v. State, 317.

13. Where no reason is given in the requested charge itself why it should have been submitted and no such reason was set up in the motion for new trial, the same will not be considered on appeal; besides, the evidence did not raise the issue submitted in the requested charge. Poteet v. State, 322.

14. Without entering into a discussion whether the grounds assigned pointed out specific error in refusing requested charges; yet, looking at the evidence in the record, no issues were raised by the evidence which authorized the submission of the charges requested; and this but illustrated the rule that the motion for a new trial should point out the errors in refusing special charges. Stewart v. State, 384.

15. Where, upon appeal, it is shown by the record that the testimony objected to was excluded, there was nothing to review on that ground. Laird v. State, 553.

16. It is elementary that this court will not review complaints of the charge of the court when made for the first time in this court. In order to authorize a review of the court's charge, the objection must be raised either

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Practice on Appeal—Continued.
by bill of exceptions or by motion for new trial in the court below; and where the appellant, on motion for rehearing, claimed for the first time, error in the court's charge, because it required the jury to believe that he collected the money from the parties before the order for liquor was made, the same could not be considered. Wilson v. State, 567.

17. An objection that the evidence is insufficient to sustain the conviction cannot be revised on appeal, in the absence of a statement of facts. Rivers v. State, 637.

18. The presumption that the court below acted fairly in regard to giving bills of exception must prevail in this court, until it otherwise appears from the record. Perry v. State, 644.

Practitioner. See Advertisement.

Precedent. See Indictment; Statutes Construed, 2.

Where the evidence objected to had been ruled to be admissible in the former appeal, there was no error. Nesbitt v. State, 374.

Predicates. See Dying Declarations.

Presumption. See Argument of Counsel, 6; Former Marriage; Insanity, 1; Misconduct of Jury, 6.

1. Where insanity is once shown to exist, it will be presumed to continue, and a judgment in the County Court declaring defendant insane and that he had been insane for ten or twelve months, which overreached the time of the alleged homicide, is prima facie evidence of insanity both before and after its rendition, and shifts the burden of proof to the State. Following Hunt v. State, 33 Texas Crim. Rep., 252, and other cases. Witty v. State, 125.

2. In the absence of a statement of facts, if the charge of the court is applicable to any state of facts which can be proved under the indictment, the presumption is that the court charged the law and all the law applicable to the case. Following Wright v. State, 37 Texas Crim. Rep., 146, and other cases. Simpson v. State, 376.

3. In the absence of a statement of facts, it must be presumed that the evidence supported the conviction and that the court properly charged the law and all the law applicable to the evidence. Chapa v. State, 492.

4. Where, upon trial of murder, the evidence showed that the defendant heard deceased's companion say that whatever he had deceased could get, meaning his pistol, and that deceased took hold of it threatening to kill defendant, the court should have submitted defendant's requested charge that if the weapon used by deceased and the manner of its use was such as was reasonably calculated to produce either death or serious bodily injury, the law presumed that deceased intended these results, as this is the rule established by precedent; and a general charge on self-defense is not sufficient where the above charge is requested. Holmes v. State, 588.

Presumption of Innocence. See Charge of Court, 11.

The law requires the jury to find the facts affirmatively before they are authorized to convict of any degree of offense, and the doctrine of reasonable doubt need not be appended to each paragraph of the charge of the court if the same as a whole properly instructs the jury on that issue, and where the court not only instructed upon the reasonable doubt on the whole case, but on the different degrees of homicide, the defendant is not denied the presumption of innocence and the benefit of the reasonable doubt. Condron v. State, 513.

Principals. See Accessory, 1; Indictment, 19.

1. Where, upon trial of murder and a conviction of manslaughter, the evidence showed that defendant acted with others in the commission of the offense, the court properly submitted the law on principals; however, the converse proposition should have also been submitted. Following McMahon v. State, 46 Texas Crim. Rep., 540, and other cases. Blackshear v. State, 113.

2. Where, upon trial of assault with intent to rob, the evidence showed

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Principals—Continued.
that other persons acted together with defendant in the alleged offense, the court correctly charged on the law of principals. Wingate v. State, 234.

3. Where, upon trial of accessory after the fact to the crime of seduction, the court properly charged the jury and distinctly required that if they had a reasonable doubt as to the guilt of the principal, to acquit defendant, there was no error. Harrison v. State, 291.

4. Where, upon trial of theft of a horse, the evidence did not show that the defendant was connected as principal with the original taking, and the charge of the court did not require the presence of the defendant at the time of such taking, the same was reversible error. La Fell v. State, 307.

5. Where, upon trial of aggravated assault, the evidence raised the issue of principals, the court correctly charged thereon. Caples v. State, 394.

6. Where, upon trial of assault to murder, the State's evidence showed a conspiracy between defendant and others to seriously injure the assaulted party, the court properly charged on the law of principals, but failed to submit the theory of the defense, which was aggravated assault and self-defense, and this was reversible error. Wilson v. State, 432.

7. Where the evidence conclusively showed that defendant controlled the place where all the sales were made and that he was the manager of said place and knew that his employer was selling intoxicating liquors, and besides, showed that defendant made numerous sales himself, etc., there was no error in refusing defendant's special charge that he could not be convicted as agent of said employer, as defendant was a principal. Creed v. State, 464.

Private Residence.

1. Upon trial of burglary, there was no error in permitting the owner of the house to testify that the same was a private residence and who constituted his family. Alsup v. State, 117.

2. An indictment for burglary need not allege what property was stolen or the value thereof; nor is it necessary to allege the character of the house, unless it is intended to charge specifically that it was a private residence. Stephens v. State, 379.

3. To bet at a game of dice is unlawful wherever the game occurs. It is only a game with cards and dominoes that is no offense when played at a private residence occupied by a family. Scott v. State, 616.

Procedure. See Legislation Suggested.

Prosecutrix. See Credibility of Witness, 2.

Provocation.

Where, upon trial of murder, the evidence showed that defendant's mind was aroused to anger by slanderous reports made by deceased concerning defendant, this in itself was not adequate cause, and the court's charge on manslaughter requiring that the provocation must arise at the time of the commission of the offense, but that all the facts and circumstances in evidence must be considered, was no error. Cloud v. State, 76.

Provoking Difficulty.

1. As the court gave no charge on provoking the difficulty nor in anywise limited the right of defendant to act from real or apparent danger, it was not necessary for the court to instruct the jury in regard to defendant's right to go armed, etc. Holmes v. State, 588.

2. Where the evidence raised the question as to whether defendant provoked the difficulty, and there was testimony pro and con, the court should have submitted, where he charged on provoking the difficulty, the converse of the proposition. Following Gaines v. State, 58 Texas Crim. Rep., 631. Ponder v. State, 654.

Public Professing to Be a Physician. See Illegal Practice of Medicine.

Public Road. See Obstructing Public Road.

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Punishment. See Recognizance.

Where, upon trial of murder, the State's case showed that the deceased was about to prosecute defendant for sodomy and declined to retract the statements he had circulated with reference thereto, when defendant shot and killed him, a conviction of murder in the second degree, assessing a penalty of twenty-five years' imprisonment in the penitentiary, was well warranted. Cloud v. State, 76.

Pursuing Occupation of Selling Intoxicating Liquors. See Sale.

1. Where the charge of the court was not subject to the criticism that it virtually instructed the jury that if they believed that the defendant made one sale of intoxicating liquors on either of the said above mentioned dates to find him guilty of the offense of pursuing the occupation, there was no error, when considered as a whole; the jury being required to find at least two sales while he was pursuing such occupation. Pierce v. State, 175.

2. It is never error to charge the law as it is, when appropriate to charge it at all, and where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the court in his charge substantially submitted the statutes applicable to the facts in evidence and did not either directly or indirectly or by implication make the criterion of the offense to consist simply of two sales as synonymous with pursuing the business or following the occupation, but made defendant's guilt depend upon the fact that he pursued such occupation and, in addition, made at least two sales as charged in the indictment, there was no error. Wilson v. State, 567.

Rape.

Where the testimony of the prosecutrix rendered it improbable, if not impossible, that the offense of rape by force was committed upon her, and defendant's testimony showed an alibi and good reputation, the conviction was not sustained. Prendergast, Judge, dissenting. Jones v. State, 265.

Reading Law. See Argument of Counsel, 3.

Real and Apparent Danger. See Self-defense, 13.

Reasonable Doubt. See Burden of Proof.

1. Where, upon trial of murder, the court's definition of reasonable doubt was in accordance with Article 765, Code Criminal Procedure, without further amplification or explanation, the same was sufficient and proper practice. Following Thompson v. State, 37 Texas Crim. Rep., 227, and other cases. Sanchez v. State, 134.

2. If the court charges on reasonable doubt as to the whole case, this will be sufficient, in the absence of a requested charge as to reasonable doubt between the degrees of the offense. Simpson v. State, 376.

3. Where the court charged that the burden rested on the State to establish the guilt of the defendant beyond a reasonable doubt, etc., or else to acquit him, but if the evidence satisfied the jury beyond a reasonable doubt of the guilt of the defendant, to convict him of that degree of the offense of which he was guilty, this could not mislead the jury that the court believed there was no reasonable doubt as to defendant's guilt, when taken in connection with other portions of the charge that defendant was not only entitled to the benefit of a reasonable doubt on the whole case, but as between the degrees of the homicide committed, and there was no error. Distinguishing Comegys v. State, 62 Texas Crim. Rep., 231. Davidson, Presiding Judge, dissenting. Condron v. State, 513.

4. It is always sufficient for the court to charge the reasonable doubt in substantial conformity to the language of the statute, and there was, therefore, no error in refusing a requested charge which did not conform thereto, Hysaw v. State, 562.

5. Where, upon trial of assault to murder, the evidence developed two theories, one, that of the State, that the defendant made the assault with intent to kill, and that of the defense, of perfect self-defense, and the court properly charged on the burden of proof, reasonable doubt and the presumption of

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Reasonable Doubt—Continued.
innocence, there was no error in the court's refusal of defendant's requested charge that there must be a concurrence of the twelve minds of the jurors, etc., with reference to reasonable doubt. Thomas v. State, 649.

Reasonable Explanation. See Theft of Horse, 3.

Reason of the Rule.
As to why the Legislature, as to exceptions to the charge of the court, made a distinction between civil and criminal cases, is not a question for the court, but for the law making body, and this construction has been followed by the Court of Criminal Appeals for over twenty years. Following Quintana v. State, 29 Texas Crim. App., 401, and other cases. Byrd v. State, 35.

Rebuttal.
Where, upon trial of fraudulent conversion of a horse, the defendant sought to meet the testimony of the alleged owner that he had inquired about his horse by showing that he had not made such inquiry, he should have been permitted to do so. Gamboa v. State, 635.

Recalling Jury.
While the earlier decisions held that under Article 754, Code Criminal Procedure, the judge was inhibited from further instructing the jury after their retirement, etc., it is now uniformly held that the judge may recall the jury and give them further instructions whenever he considers it necessary, and where he briefly and succinctly told the jury what to do in answer to their question propounded, there was no error. Following Benavedias v. State, 31 Texas Crim. Rep., 173. Harrison v. State, 291.

Recalling Witness.
Upon trial of theft of cattle, there was no error in permitting the State to recall the main State's witness after the testimony had been closed and defendant's argument had been closed, and permit him in the presence of the jury to write his name on a piece of paper for the purpose of comparing it with his alleged signature to a tax rendition, and permit same to be considered by the jury; the court offering ample opportunity for cross-examination and additional argument; no abuse of the court's discretion having been shown. Webb v. State, 413.

Receiving Stolen Property.
Where defendant was prosecuted for receiving stolen property knowing it to have been stolen at the time he received it, a charge of the court that if defendant did not know by the exercise of ordinary diligence that the property was stolen, etc., was reversible error, as defendant must have received the property with a fraudulent intent to convert to his own use and deprive the owner of the value thereof. Following Bray v. State, 41 Texas, 203, and other cases. Forrester v. State, 62.

Recent Possession.
1. Where, upon trial of theft from the person, the court's charge on recent possession and explanation fully submitted defendant's side of the case according to the facts in the case, there was no error. Brooks v. State, 366.
2. Where the charge of the court on explanation of recent possession instructed the jury to pass upon such explanation directly as was given by defendant, instead of giving the other form of reasonable explanation, there was no error. Webb v. State, 413.
3. Where, upon trial of theft of a horse, the defendant claimed that he had traded therefor, and the court charged the jury that if they believed that he traded for said horse or had a reasonable doubt to acquit him, there was no error in refusing a special charge on the same question couched in a more formal manner. Following Hinsley v. State, 60 Texas Crim. Rep., 565. Stephens v. State, 437.

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Recent Possession—Continued.

4. Where, upon trial of burglary, there was evidence of defendant's explanation of his possession of the alleged stolen property, which was introduced by the State, it was reversible error to charge the jury that they must find that defendant's explanation was consistent with his innocence, as he may have received it knowing that it was stolen property and yet was not guilty of the burglary. Gusemano v. State, 557.

5. Where defendant, at no time, gave any explanation of his recent possession of the alleged stolen property and the court instructed the jury on circumstantial evidence, there was no error in the court's failure to charge on explanation of recent possession. McGee v. State, 580.

Recognizance. See Appeal Bond.

1. Where the alleged recognizance did not state the punishment found by the jury, the same was insufficient. Wilder v. State, 59.

2. Where the recognizance failed to state the amount of punishment the appeal must be dismissed on motion of the State. Butler v. State, 232.

Recollection of Witness. See Rule Stated, 5.

Reconciliation. See Motive, 1.

Re-direct Examination. See Theft, 3.

Reforming Judgment.

1. Where the verdict assessed the punishment against one of the defendants at five years in the penitentiary, and the judgment and sentence for a period of ten years, this court, under Article 938, Code Criminal Process, will correct and reform the judgment so as to make it conform to the verdict. Following McCorquodale v. State, 54 Texas Crim. Rep., 344. Martinez v. State, 280.

2. Where, upon trial of burglary by the discharge of firearms into the house of another with intent to injure the inmates, of which offense he was convicted, but inadvertently sentenced for an assault with intent to murder, the judgment will be so reformed as to comply with the verdict of the jury and the judgment will be affirmed. Gardington v. State, 595.

Regular Order. See Contradicting Witness, 2.

Regular and Special Term of Court. See Order Concerning Term.

Regular Term.

Where the various orders entered by the judge designated a special session or special term of the District Court as a part of the regular term of the court, such recitation in the orders could not, and did not, change the legal effect and the effect in fact that the term called was a special term, and that the orders made therein were made at a special term or session of the court. Mayhew v. State, 187.

Rehearing. See Statement of Facts, 18.

Religious Worship. See Knowledge of Defendant.

Where people had gathered at a church for religious worship, and it afterwards turned out that the minister had not undertaken to hold such worship, they were, nevertheless, protected under the law from an unlawful and willful disturbance. Following Yarborough v. State, 19 Texas, 162. Laird v. State, 553.

Remarks by Judge. See Motive, 3.

1. Where it appeared on trial that no jury had been empaneled, and it was not shown that anyone who served on the jury heard the remark by the judge to which objection was made, there was no error. Pierce v. State, 175.

2. Where the remarks by the trial judge to the jury before they were

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Remarks by Judge—Continued.
discharged as to statements which they might make to defendant's counsel were harmless, and no injury was shown to defendant by reason thereof, there was no error. Mayhew v. State, 187.

3. Upon trial of murder, there was no error in the remarks by the court to defendant's counsel that if they knew of any improper conduct by the district attorney they could prove it, but would not be allowed to take the time of the court by fishing around to see what they could prove. McKelvey v. State, 538.

4. Where the court before reading his charge to the jury explained to them the reason of the delay in the preparation of his charge, at which the jury had become impatient, there was no error. Wilson v. State, 567.

5. Upon trial of theft of a hog, it was error on part of the trial judge to make certain remarks on the condition of the witness and the character of his testimony with reference to finding tracks, etc., as the same was a direct comment on the testimony and in violation of the statute. Matthews v. State, 639.

Repeal. See Former Law.

By the Revised Statutes of 1911, Section 4, repealing clause of the final title of said Revised Statutes, under the general provisions, all civil statutes of a general nature in force when said Revised Statutes took effect and which are not included therein and which are not thereby expressly continued in force, are thereby repealed, and this repealed all those articles of the Revised Statutes of 1895, which required previous notice of the time and publication, convening the District Court in special session; and no notice is now required. Mayhew v. State, 187.

Repeal by Implication.

1. See opinion for a full discussion of the rules applicable with reference to the abrogation of particular legislation and repeal by implication, etc. Durham v. State, 71.

2. See opinion for discussion of rules of construction as to direct repeal and repeal by implication of statutes. Berry v. State, 602.

Repetition.

Where, upon trial of murder, the record showed that the alleged examination of the witness was a mere repetition of what the witness had already testified to, there was no error in sustaining objections by the State thereto. Christie v. State, 598.

Report of Tax Assessor. See District Court, 2.

Reproduction of Testimony. See Bill of Exceptions, 1.

1. Where, upon trial of forgery, a sufficient predicate was laid for the reproduction of the testimony of an absent witness who had permanently removed from the State, there was no error. Following Connery v. State, 23 Texas Crim. App., 378, and other cases. Davidson, Presiding Judge, dissenting. Whorton v. State, 1.

2. Where, upon trial of murder, the State's witness who had testified on a previous trial was shown to reside beyond the limits of the State, there was no error in reproducing his testimony. Following Robertson v. State, 63 Texas Crim. Rep., 216, and other cases. Pace v. State, 27.

3. Where an expert witness had testified as to the insanity of the defendant in a former trial testing his sanity in the County Court, wherein the defendant was adjudged insane, and defendant was several months thereafter placed on trial for murder, and said witness was then dead, it was error to exclude said expert's testimony in said County Court which was offered in behalf of defendant; the facts on which the hypothetical questions to said expert were based being substantially the same on both trials. Following Smith v. State, 66 Texas Crim. Rep., 593, 148 S. W. Rep., 722. Witty v. State, 125.

4. Where, upon trial of murder, there was a sufficient predicate laid to admit the testimony given on a former trial by a State's witness who had left the State, there was no error. Following Robertson v. State, 63 Texas Crim. Rep., 216. Sanches v. State, 134.

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Reproduction of Testimony—Continued.

5. The mere fact that the witness was absent would not authorize his former testimony to be reproduced, unless it was shown that he was dead, beyond the jurisdiction of the court, or intentionally kept away. Following Robertson v. State, 63 Texas Crim. Rep., 216. Green v. State, 485.

6. In the absence of a proper predicate, it was error to reproduce the testimony of an absent witness; besides, the testimony was not of an impeaching character and should not have been admitted for that purpose. Gamboa v. State, 635.

Reputation of Deceased.

Where defendant did not attempt to show that the deceased had the general reputation of being a violent and dangerous man, it was improper for the court to prove or disprove this fact. Hysaw v. State, 562.

Reputation of Prosecutrix.

Upon trial of seduction, the court indicated to defendant that he could prove the character of prosecutrix by general reputation, etc., and the record showed that the witnesses would not have testified to specific acts of sexual intercourse between prosecutrix and third parties, there was no error. Walls v. State, 317.

Requested Charges. See Charge of Court.

1. Where one requested charge was not applicable to the facts and the other embraced in the court's main charge, there was no error in refusing them. Sanches v. State, 134.

2. Where no reason is assigned in the motion for new trial why the requested charges should have been given, there was no error. Following Ryan v. State, 64 Texas Crim. Rep., 628, and other cases. Mayhew v. State, 187.

3. Where some of defendant's requested charges were submitted and others were refused because not applicable to the testimony, there was no error. Pugh v. State, 357.

4. Where, upon trial of murder, there was evidence that defendant fired four shots at the deceased, there was no error in refusing a requested charge that if either of the first shots were fatal and the fourth was not, that the firing of the latter was immaterial, as all the facts at the time of the killing were admissible and material for the consideration of the jury. Decker v. State, 410.

5. Where, upon trial of unlawfully and willfully disturbing religious worship, the evidence showed that defendant was one of the men who rode by the church window and threw a jug through the window, it was immaterial whether he rode a horse, a mule, or was walking, and there was no error in the court's failure to submit a requested charge that if defendant was riding a mule, to acquit him. Laird v. State, 553.

6. Where one of defendant's special instructions was embraced in the court's main charge and the other was not raised by the evidence, there was no error in the court's refusal of them. Holmes v. State, 588.

7. Where the requested charges, which were applicable were substantially contained in the court's main charge, there was no error in refusing them. Clyman v. State, 638.

8. Where, upon trial of aggravated assault, defendant's requested charges were substantially given in the court's main charge, there was no error. Nickerson v. State, 659.

Res Gestae. See Declarations and Acts of Third Party, 4; Mental Condition of Defendant.

1. Upon trial of burglary, there was no error in permitting the State to show what the defendant did when the witnesses came to the alleged house to arrest him. This was res gestae. Alsup v. State, 117.

2. Upon trial of burglary, there was no error in admitting testimony as to the remarks of the officer with reference to the defendant resisting arrest just before he arrested him, it being part of the res gestae. Id.

3. Where the acts of a third party were clearly a part of the res gestae occurring within a few seconds after the defendant stabbed the deceased, and that the defendant, at the time, was standing within a few feet from said third

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Res Gestae—Continued.
party at the time, there was no reversible error; besides, the bill of exceptions was defective. Mayhew v. State, 187.

4. Where the exclamation of the injured party introduced in evidence was res gestae, the same was admissible; besides, the bill of exceptions raising this question was defective. Martinez v. State, 280.

5. Upon trial of murder, there was no error in admitting testimony as to what was found in the pockets of the deceased; it not being so remote as to render it inadmissible. Clements v. State, 369.

6. The acts, remarks and conduct of the deceased right after the shooting were admissible as res gestae. Simpson v. State, 376.

7. All the facts and circumstances immediately occurring at the time and place of the main fact are res gestae, and there was no error, upon trial of disturbing the peace, to show that defendant motioned with his hand in connection with the language he used; besides, the bill of exceptions was defective in not showing why the testimony was inadmissible. Hart v. State, 417.

8. Where, upon trial of murder, the evidence showed that not more than twenty yards were traveled by defendant from the time the wound was inflicted until he returned to the deceased and kicked her and used the language attributed to him, the same was res gestae and part of the transaction and admissible in evidence. Davis v. State, 420.

9. Upon trial of assault with intent to rape, there was no error in admitting in evidence the declarations of prosecutrix occurring shortly after the alleged assault, after she had gone about a quarter of a mile from where it occurred, and in answer to a question, reported what had happened to her and that defendant had assaulted her. Fuller v. State, 534.

10. Upon trial of theft of certain gin belting, there was no error in permitting the officers who held a search warrant to search defendant's house, to show that this house was pointed out to them; that they found and identified the belting; that defendant's hands were greasy from handling the same, and that he requested the officers to carry him to this house where he washed his hands and changed his clothing; it being shown that defendant occupied this house a few days before the theft and had his goods there. McGee v. State, 580.

Res Gestae Statement.

Where, upon trial of murder, the res gestae statement of defendant that he had to kill deceased because he came at him with a knife was not an admission or confession by him, and was part of the res gestae of the transaction; and besides, the State introduced other evidence upon which to base a conviction of murder, all of which was submitted under a proper charge of the court, there was no error in the court's failure to instruct the jury that they could not convict defendant because of his res gestae statement, unless they found the same untrue beyond a reasonable doubt. Davidson, Presiding Judge, dissenting. Following Slade v. State, 29 Texas Crim. App., 381, and other cases. Powdrill v. State, 340.

Revenue License.

Upon trial of keeping a disorderly house for the sale of intoxicating liquors without license, there was no error in permitting the witness to testify that he saw an internal revenue license posted in the place of defendant's building. Johnson v. State, 107.

Revised Statutes. See Duty of Codifiers.

Revision of Codes. See Former Law.

Robbery. See Evidence.

Where, upon trial of robbery, the evidence supported the conviction, there was no error. Serop v. State, 399.

Rule of Construction. See Repeal by Implication.

Rule Stated. See Adequate Cause, 4; Absent Witness, 1; Cross-examination, 3; Errors Must Be Pointed Out; Indictments; Jurisdiction by Consent;

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Rule Stated—Continued.

Jury and Jury Law; 7; Lucid Intervals, 1; Newly Discovered Evidence, 10; Practice on Appeal, 2; Presumption, 1; Reason of Rule.

1. The certainty required in an indictment is only such as will enable the defendant to plead the judgment that may be given upon it in bar of any prosecution for the same offense. Byrd v. State, 35.

2. Where, defendant, on cross-examination, elicited the fact from the State's witness that he had been indicted for running a gambling house, there was no error in permitting the State to show that such case was dismissed after an acquittal of one of his co-defendants. Johnson v. State, 107.

3. In cases of circumstantial evidence, the rule is that each fact necessary to establish guilt must be proven, and the facts and circumstances must not only be consistent with guilt, but inconsistent with any other reasonable hypothesis than the guilt of the accused. Yarbrough v. State, 150.

4. It has always been the rule that if it is sought to discredit a witness on cross-examination, that he may state the real facts connected with the questions inquired about and by which it is sought to impair his credit, on re-direct examination. Following Tippett v. State, 37 Texas Crim. Rep., 186. Manley v. State, 169.

5. If a witness had no present recollection of the fact, if he is able to refer to data which he knows was correct at the time it was made, the data may be used to prove the fact, even though at the time of the trial, the witness had no independent recollection of the fact. Following Kimbrough v. State, 28 Texas Crim. App., 367, and other cases. Misher v. State, 223.

6. To constitute an accomplice under our statute, it must be charged and proved, first, that an agreement had been entered into and the principal had been advised or commanded by the accomplice to commit the crime; second, that the principal committed the offense; third, that before the crime was committed, the accomplice advised or commanded the principal to do the particular overt act, or some act within the purview of the original design; fourth, that these acts were within the term of the conspiracy or agreement between the principal and accomplice. Cooper v. State, 405.

7. It is only when proof of another offense is such that the jury might use that testimony improperly to convict for that collateral offense instead of the offense charged and on trial, or make some other unwarranted use of that testimony to the prejudice of the defendant that it is necessary to limit the purpose for which such evidence is admitted. Following Thornley v. State, 36 Texas Crim. Rep., 118, and other cases. Distinguishing Saldiver v. State, 55 Texas Crim. Rep., 177; Reno v. State, 25 Texas Crim. App., 102. Bailey v. State, 474.

8. Where it was sought to be shown that the State's witness had testified under an agreement that he would not be prosecuted for the offense, this would be an effort to show a corrupt motive, and it was, therefore, permissible to admit testimony that the witness had made similar statements before the justice of the peace. Davidson, Presiding Judge, dissenting. Gusemano v. State, 557.

9. If a case is either assault to murder or perfect self-defense, it is not error to fail to charge on aggravated assault. Following Johnson v. State, 47 Texas Crim. Rep., 300, and other cases. Thomas v. State, 649.

Sale. See Distinct Offense.

Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the evidence showed that the defendant ordered liquor to be drunk with lunches with which he served certain parties, and the defendant claimed that he ordered this liquor for the accommodation of the parties and claimed that he collected the money from them before he ordered it, but the State denied this and contended that it was a sale and that he collected the money after ordering the liquor, and the court in his charge specifically followed the testimony as made by the defendant himself on this point in submitting the issue, there was no reversible error. Wilson v. State, 567.

Second Application For Continuance.

Where the application for continuance was the second in number and did not state that the testimony could not be procured from any other source, but

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Second Application For Continuance—Continued.
showed on its face that it could be so procured and, besides, there was a want of diligence in not applying for process after the witness moved out of the county of the prosecution, there was no error in overruling a motion for continuance. Boseley v. State, 100.

Security for Costs. See Statement of Facts, 15.

Seduction. See Reputation of Prosecutrix; Other Acts of Intercourse.

1. Where, upon trial of accessory after the fact to the crime of seduction, the evidence sustained the conviction and the court properly charged the law of the case, there was no error. Harrison v. State, 291.

2. Where, upon trial of seduction, the evidence was sufficient to sustain the conviction, although conflicting, there was no error. Walls v. State, 317.

Seeking Explanation. See Self-defense, 1.

Self-defense. See Murder, 15.

1. While it is the settled law of this State that if one learns another is circulating reports detrimental to him, he may seek an explanation and thereby does not forfeit his right of self-defense, yet, where no threats are made or communicated to defendant and there are no facts which would create in any reasonable mind a present danger of death or serious bodily injury, and from the State's point of view, the idea that deceased was making any hostile demonstration at the time of the homicide was excluded, a failure of the court to charge on self-defense is not error. Cloud v. State, 76.

2. Where, upon trial of assault to murder, the evidence clearly raised self-defense in connection with threats, but did not raise self-defense otherwise, so as to require an additional charge on that subject, a failure to so charge was not reversible error. Bussey v. State, 98.

3. Where it was not clear that the issue of self-defense was raised by the evidence and the cause was remanded on other grounds, this question need not be decided; however, the fact that others and not the deceased threw rocks at defendant would not justify the homicide. Blackshear v. State, 113.

4. Where, upon trial of murder, the evidence raised the issue of self-defense, the court should have given a clear and affirmative charge thereon. Jones v. State, 216.

5. Where, upon trial of aggravated assault, the evidence showed that the defendant was acting in self-defense, a charge of the court curtailing the defendant's right of self-defense to the issue of more force than was necessary, etc., was reversible error; the defendant having requested proper charges on this issue of the case. Parish v. State, 254.

6. It is the well established law of this State that where the case presents either murder or perfect self-defense, there is no error in the court's failure to charge on manslaughter; besides, in the instant case, there was no evidence of self-defense. Following Treadway v. State, 65 Texas Crim. Rep., 208. Powdrill v. State, 340.

7. Where, upon trial of murder, the State's case was sustained by its testimony, and defendant's case was one of self-defense, both of which theories the court fully submitted to the jury, who convicted the defendant of murder in the second degree, there was no error. Pugh v. State, 357.

8. Where, upon trial of murder, the court properly instructed on the issue of self-defense, and the evidence did not raise the question of manslaughter, there was no error in the court's failure to charge thereon. Id.

9. Where, upon trial of assault to murder, the State claimed a waylaying by the defendant, but the defendant denied this and claimed self-defense, which was supported by his evidence, the court's failure to charge on self-defense was reversible error, notwithstanding such claim of self-defense might probably not be true. Wilson v. State, 432.

10. Where, upon trial of murder, the court properly submitted self-defense and accidental homicide, as raised by the evidence, and the issue of negligent homicide was not raised by the evidence, there was no error in the court's failure to submit the latter. Manley v. State, 502.

11. Where the defendant claimed that the court's charge on manslaughter

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Self-defense—Continued.
in one instance instructed the jury that if the officers who attempted his arrest, one of whom was deceased, were using greater force than was necessary under the circumstances and this produced adequate cause to render defendant's mind incapable of cool reflection to find him guilty of manslaughter, and in another part of the charge, instructed them that if such arrest was made in a wanton manner and the use of greater force than was necessary, the defendant would be justifiable in killing deceased, but when the charge was considered as a whole, no such conflict occurred in the court's charge, there was no reversible error. Davidson, Presiding Judge, dissenting. Condron v. State, 513.

12. It is better practice, in submitting an issue to the jury, to apply the charge of the court to the evidence, instead of submitting the matter in a general way, and where the court followed this practice, there was no error. Salmon v. State, 506.

13. Where, upon trial of murder, the evidence did not raise an actual attack, but a reaching by deceased for a pistol, which, if true, would probably create in the mind of one a fear that deceased was then and there about to assault defendant, the court should have so written his charge on murder in the second degree and manslaughter that it would give defendant a right of self-defense from real or apparent danger. Holmes v. State, 588.

14. Where, upon trial of murder the court properly charged on self-defense as made by the evidence, there was no error in refusing requested charges on the same subject. Simmons v. State, 624.

15. Where, under the evidence, the issue of mutual combat and self-defense were presented, defendant's right of self-defense should not have been abridged by a charge on excessive force, as the evidence did not raise this issue. Corley v. State, 626.

16. Where, upon trial of assault to murder, the court submitted defendant's theory of self-defense in a proper charge, there was no error. Thomas v. State, 649.

Self-Serving Declarations.

1. Where defendant did not testify in the case, he could not make evidence for himself by proving by others that on a given occasion he had told them certain things. Byrd v. State, 35.

2. Upon trial of unlawfully killing a wild deer, there was no error in excluding the self-serving declarations of defendant after the commission of the offense. Baker v. State, 50.

3. Upon trial of murder, there was no error in excluding the self-serving declarations made by the defendant to his witness after his arrest, and there was no reversible error in the State's counsel's remark that if they wanted to prove that fact, to place defendant on the stand; the same occurring during trial, and was but an incidental remark of State's counsel, and not such an allusion to defendant's failure to testify as to be cause for reversal. Following Combs v. State, 55 Texas Crim. Rep., 332, and other cases. Boseley v. State, 100.

4. Upon trial of murder, there was no error in excluding the self-serving declarations of defendant which had no connection with the killing. Salmon v. State, 506.

5. Where, upon trial of murder, the declarations of the defendant after the homicide showed calmness and deliberation and were not the events speaking through the defendant, the same was self-serving and inadmissible in evidence; besides, the same was contradictory of his testimony, and if error, was harmless. McKelvey v. State, 538.

Selling Intoxicating Liquors. See Information, 4; Occupation.

Separation of Jury. See Challenge; Jury and Jury Law, 7; Misconduct of Jury, 10.

Separate Offense.

In prosecutions for keeping a disorderly house for purposes of prostitution, where the State alleged separate offenses in different counts, there was no error in the court's charge instructing the jury to return a verdict upon each count in the indictment. Clyman v. State, 638.

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Serious Bodily Injury. See Aggravated Assault, 1, 3, 10.

Where the evidence showed that defendant was illegally arrested and that he made no effort to effect his release, but used abusive language towards the officer, who struck him, whereupon defendant inflicted upon said officer serious bodily injury, he was guilty of aggravated assault. Nickerson v. State, 659.

Severance. See Fugitive from Justice.

Where the indictment of defendant's codefendant was pending in a different court, there was no error in overruling a motion for severance. Following Price v. State, recently decided. Polk v. State, 53.

Sheriff. See Talesmen, 2.

Shooting into House of Another with Intent to Injure. See Burglary, 6.

Shorthand Facts.

1. Where, upon trial of adultery, a State's witness was permitted to testify that defendant lived together with his paramour, this was a shorthand rendition of the facts, and not a conclusion of the witness, and therefore admissible; besides, the bill of exceptions was defective. Following Conger v. State, 63 Texas Crim. Rep., 312. Brown v. State, 138.

2. Upon trial of murder, there was no error in admitting testimony as to the opinion of the witness that a person standing at a certain place could have shot the deceased, the same being merely a shorthand rendition of the facts; besides, the same facts were proved by other witnesses without objection. Following Wagner v. State, 53 Texas Crim. Rep., 306, and other cases. Christie v. State, 598.

Signature. See Information, 1.

Where, upon trial of forgery, while a State's witness was testifying that he did not write his name on the back of the alleged forged check, the court permitted him to write his name on a slip of paper in the presence of the jury, but the jury did not see the signature and the paper upon which it was written was excluded from the consideration of the jury, there was no error. Whorton v. State, 1.

Signature of Judge.

Where the bill of exceptions to certain testimony as to whether the party rode a horse or a mule, etc., was not signed by the trial judge, the same could not be considered on appeal. Stephens v. State, 379.

Simple Assault.

In the absence of evidence raising the issue of simple assault, there was no error in the court's failure to charge thereon. Caples v. State, 394.

Slanderous Reports. See Adequate Cause, 1.

Social Club. See Subterfuge.

Special Charges.

In the absence of a statement of facts, the refusal of requested charges cannot be considered on appeal. Wilder v State, 59.

Special Judge. See District Judge, 2.

1. The election by agreement of parties of a special judge when the regular judge is disqualified must be done under the Constitution and laws of the State or the judgment is a nullity. Following Abrams v. State, 31 Texas Crim. Rep., 449. Summerlin v. State, 275.

2. Where the special judge had been elected, qualified and opened the District Court for the term, it remained open until the end of the term, unless sooner adjourned for the term by order of the judge presiding, and the temporary leaving of the judge did not adjourn the term. Creed v. State, 464.

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Special Term. See District Court, 1; Regular Term; Repeal; Change of Venue, 1.

Where the order of the judge was that the District Court convene in special session at a certain place and time, it showed without question that the judge convened the said District Court in special session, and the fact that said time at which he convened said special session embraced part of the time fixed by law at which the regular term of said court could have been continued and held, cannot and did not make any difference so far as effecting the validity of said special term of the court and the orders made therein. Mayhew v. State, 187.

Specific Acts. See Character of Deceased.

Where, upon trial of murder, proof that deceased habitually carried a pistol was admissible, but testimony that a witness saw deceased carry a pistol at one time was not admissible. Hysaw v. State, 562.

Specific Intent. See Assault to Rape, 3.

Specific Intent to Rob.

Where the court's charge required an assault with intent to then and there by such assault and violence to rob the party injured, a complaint that the court's charge failed to instruct on specific intent to rob was untenable. Wingate v. State, 234.

Spiriting Away Witness. See Accessory, 2.

Statement of Facts. See Approval by Judge; Filing in Misdemeanor Cases; Misconduct of Jury; Ninety Days' Limit; Presumption, 2; Special Charge.

1. In the absence of a statement of facts, the charge of the court and the refusal of the continuance without bill of exceptions can not be considered on appeal. Edwards v. State, 44.

2. In the absence of a statement of facts, the question as to the court's failure to charge on simple assault, and the objection to the argument of counsel can not be considered on appeal. Reeves v. State, 58.

3. Where, upon appeal from a conviction of a misdemeanor, the statement of facts was not properly filed, the same could not be considered. Wilder v. State, 59.

4. Neither bills of exception nor statement of facts in County Court cases filed in the lower court after adjournment can be considered by this court unless an order is made during term time authorizing such filing. Following Hamilton v. State, 65 Texas Crim. Rep., 508. Durham v. State, 71.

5. Where the alleged statement of facts was not approved by the trial judge, the same can not be considered on appeal. Flagg v. State, 107.

6. Where, upon an appeal from a conviction of robbery, it was not shown that the defendant had been deprived of a statement of facts through no fault of himself or counsel, there was no reversible error. Green v. State, 230.

7. Where, upon appeal from a conviction of aggravated assault, no order of record appeared authorizing the filing of a statement of facts after term time, the same could not be considered. Yeary v. State, 285.

8. Where the statement of facts in a misdemeanor case was filed thirty days after the adjournment of the County Court, the same could not be considered on appeal. Following Mosher v. State, 62 Texas Crim. Rep., 42, 136 S. W. Rep., 467, and other cases. De Friend v. State, 329.

9. Where the statement of facts was either dated back, or when filed did not bear the judge's signature, the same could not be considered on appeal. Simpson v. State, 376.

10. Where the statement of facts was signed by the county attorney and approved by the trial judge who stated that the statement of facts was correct, that he approved the same and ordered it filed as a part of the record in the cause, and the same was filed within time, the same was a substantial compliance with Article 824, Code Criminal Procedure, when taken in connection with the Revised Civil Statutes on this subject, although the same was not signed by appellant's counsel. Following Kelso v. Townsend, 13 Texas, 140. Serop v. State, 399.

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Statement of Facts—Continued.

11. In the absence of a statement of facts, the sufficiency of the evidence can not be reviewed. Polk v. State, 430.

12. Where the statement of facts of the evidence on motion for new trial was not filed in term time, the same can not be considered on appeal; besides, there was no error. Following Probest v. State, 60 Texas Crim. Rep., 608. Bryant v. State, 457.

13. Where the alleged statement of facts is not signed by the attorneys trying the case and is not approved by the trial judge, the same could not be considered on appeal. Chapa v. State, 492.

14. A statement of facts containing two hundred and forty typewritten pages is unnecessarily voluminous, and should have been condensed. Salmon v. State, 506.

15. Where, upon appeal from a conviction of bigamy, the record showed that defendant, in his motion and affidavit, did not allege that he was not able to give security for the cost of making out a transcript as provided under section 8, Act of March 31, 1911, p. 264, his contention that the case should be reversed because he was not furnished a statement of facts free of any cost to him, and without his giving security therefor, is untenable and the cause must be affirmed in the absence of a statement of facts. Kelly v. State, 550.

16. In the absence of a statement of facts, an objection to the charge of the court can not be reviewed; besides, the charge requested by defendant was substantially given in the court's main charge. Rivers v. State, 637.

17. Where appellant filed a motion in the trial court asking that the original statement of facts in question and answer form as made up by the stenographer be sent up, which was overruled, and he thereupon accepted the bill of exceptions, as qualified by the court, it is too late to complain in this court, and this can not be shown by ex parte statements. Perry v. State, 644.

18. Where the case was affirmed in the absence of a statement of facts, but it was shown on motion for rehearing that the clerk had inadvertently omitted the same from the record, the case will be heard on its merits. Thomas v. State, 649.

Stating Facts. See Practice on Appeal, 7.

Statutes Construed. See Arrest; Bail Bond; Court of Civil Appeals; Deed; District Judge, 1; Enclosure; Forgery, 2; Former Law; Form of Indictment; Illegal Hunting; Independent Statement of Facts; Indictment; Posting Enclosures; Recalling Jury; Statement of Facts, 10; Statutes not Repealed; Venue, 2; Withdrawal of Plea.

1. An indictment which charges the commission of an offense in ordinary and concise language so as to enable a person of common understanding to know what is meant, and with that degree of certainty to give the defendant notice of the particular offense with which he is charged and enables the court to pronounce proper judgment is sufficient. Article 460 C. C. P. Thompson v. State, 31.

2. The Act of May 14, 1907, p. 446, on the subject of filing statement of facts in the County Court in misdemeanor cases is still in force and is not changed by the enactments of the Revised Statutes of 1911, Civil or Criminal. Following Mosher v. State, 62 Texas Crim. Rep., 42. Durham v. State, 71.

3. Under Article 251, Code Criminal Procedure, where the defendant received the alleged embezzled money in the county of the prosecution, the jurisdiction of the court was sustained. Poteet v. State, 322.

4. See opinion construing Articles 48, 49, 50, 80, 82, Revised Penal Code, with reference to accomplices and principals, and the commission of other offenses by accident or mistake, holding that the independent design of the principal to kill deceased can not constitute guilt of the alleged accomplice, and that a mistake or accident on the part of the principal must grow out of or be connected with the original design between the principal and the accomplice. Cooper v. State, 405.

5. See opinion for construction and review of Articles 698, 699, 745, 746, 10, 22, 687, 690, 837, Code Criminal Procedure, with reference to separation of jurors and securing a fair and impartial trial. Jones v. State, 447.

6. The Act of 1899 specifically states in section 4 that it does not repeal

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Statutes Construed—Continued.

Articles 804 and 805, Penal Code of 1895, and section 2 of the Act of 1903 specifically provides that it does not apply to inclosures containing two thousand acres or more. Berry v. State, 602.

Statutes not Repealed.

The Code prepared by the codifiers and adopted by the Legislature in 1911 did not in any provision thereof deal with hunting on inclosed lands of another of two thousand acres or more, and, therefore, did not repeal the Act of 1899, either expressly or by implication, and the same is still in full force and effect. Berry v. State, 602.

Stenographer. See Official Court Stenographer.

Stenographer's Transcript.

Where the court stenographer testified that the testimony of the absent witness was a correct transcript of his testimony, there was no error in admitting same in evidence. Pace v. State, 27.

Stock Law. See Appeal Bond.

Street. See Dedication of Street.

Subsequent Application. See Continuance.

Subterfuge. See Occupation, 6.

Where, upon trial of keeping a disorderly house for the sale of intoxicating liquors, etc., the defendant elicited testimony that the defendant was president of a social club, etc., but there was no evidence that a charter had been obtained, and that if it had been obtained it was a subterfuge and was no defense against selling liquors without license, and the court so instructed the jury, there was no error in refusing a requested instruction that the burden of proof was on the State in this behalf. Johnson v. State, 107.

Sufficiency of the Evidence. See Adultery; Aggravated Assault, 2; Assault to Murder; Assault to Rape; Assault to Rob, 2; Attempt at Burglary; Burglary, 3, 4, 5, 7; Carrying Pistol; Corpus Delicti; Disturbing Peace; Forgery, 7; Gaming, 1, 3, 4; Illegal Practice of Medicine; Local Option, 8; Manslaughter, 12, 14; Murder; Occupation; Pandering; Practice on Appeal; Punishment; Robbery; Seduction; Theft of Cattle; Theft from Person; Theft of Horse; Theft of Mule.

1. Where, upon trial of murder, the evidence was sufficient to sustain the conviction, and the charge of the court presented defendant's theory of defense as made by the testimony as favorable as it was possible to do, there was no error. Davis v. State, 420.

2. Where, upon trial of unlawfully and willfully disturbing religious worship, the evidence sustained the conviction, there was no error. Laird v. State, 553.

3. Where the court's main charge covered the requested charge except one, which instructed the jury to acquit peremptorily, and the evidence sustained the conviction, there was no error. Perry v. State, 644.

4. Where, upon trial of murder and a conviction of manslaughter, the evidence, under a proper charge of the court, sustained the conviction, there was no error. Bogue v. State, 656.

5. Where, upon trial of aggravated assault for inflicting serious bodily injuries, the evidence sustained the conviction, there was no error. Nickerson v. State, 659.

Sunday Law.

Where defendant was charged with keeping a disorderly house for the sale of intoxicating liquors without license, the question of a violation of the Sunday Law was not involved, and there was no error in refusing requested charges thereon; besides, they were not the law. Johnson v. State, 107.

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Supporting Testimony. See Rule Stated, 8.

Where, upon trial of burglary, the defendant sought to impeach the testimony of prosecutrix, there was no error in permitting the State to introduce supporting testimony to the effect that she had made these statements before, and there was no error in not charging on such testimony. Gardington v. State, 595.

Surety. See Bail Bond; Surrender of Principal.

Surplusage. See Indictment, 23.

Unnecessary words in an indictment should be rejected as surplusage, and redundant words and allegations may be treated as mere surplusage. Following Mayo v. State, 7 Texas Crim. App., 342, and other cases. Thompson v. State, 31.

Surprise. See Impeaching Own Witness.

Surrender of Principal by Surety.

Where appellant was convicted of a felony, gave notice of appeal and entered into bail bond pending his appeal, and thereafter his surety surrendered him to the sheriff and he subsequently escaped, but was recaptured, his contention that his surety had no right to surrender him and that the original bail bond is still in effect is untenable. Ex Parte Cobb, 473.

Suspicions. See Circumstantial Evidence, 4.

Swearing Jury. See Jury and Jury Law, 5.

Talesmen. See Jury and Jury Law.

1. While the court should have granted the motion to place the names of the talesmen on separate slips of paper, etc., as the statute directs, yet, where the record showed on appeal that no injury whatever occurred by this action of the court and that no objectionable juror was forced upon the defendant, there was no error. Following Mays v. State, 50 Texas Crim. Rep., 165, and other cases. Ellis v. State, 468.

2. Where the sheriff was not disqualified to summon jurors in the case, the judge of the court was not authorized directly or indirectly to set him aside, as such officer, and appoint a private citizen to discharge the duties of sheriff in summoning talesman, and the same was reversible error; and the fact that the sheriff may have had a heated campaign for renomination did not disqualify him to summon jurors. Todd v. State, 610.

Term of Court. See Special Judge, 2.

Testimony Probably Not True. See Continuance.

Theft. See Original Taking; Ownership; Want of Consent.

1. Where, upon appeal from a conviction of theft, the defendant asked a peremptory charge of acquittal, and the bill of exceptions did not give the evidence on the question of venue but referred to the statement of facts, the same could not be considered on appeal, and under Article 938, Code Criminal Procedure, there was no reversible error. Following Conger v. State, 63 Texas Crim. Rep., 312; besides, the venue was sufficiently proven. Lane v. State, 65.

2. Where, upon trial of theft, the evidence did not show the finding of any of the stolen property and the case depended entirely on circumstances, it was necessary to show that defendant, and defendant alone, was in such juxtaposition to the property as that he and he alone could have stolen it, or positively to have shown that others who had equal opportunity to steal the property did not do so. Yarbrough v. State, 150.

3. Upon trial of theft over the value of $50, where defendant sought to break the force and effect of the testimony of a material State's witness on cross-examination to show ill-will towards defendant, there was no error in permitting the State, on re-direct examination, to explain each of the transactions testified about on cross-examination. Manley v. State, 169.

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Theft—Continued.

4. Where, upon trial of theft, the evidence did not show with any degree of certainty that defendant was the man who stole the alleged horse, if it was stolen, the evidence was insufficient to sustain a conviction. Rios v. State, 233.

5. Where, upon trial of theft, the evidence did not show that the defendant had in his possession any of the alleged stolen property or that he had ever taken same, and the property recovered was never identified as being that alleged to have been stolen, the conviction could not be sustained. Peace v. State, 245.

6. Where, upon trial of theft, the evidence did not show that the alleged suit of clothes which was found in defendant's possession was identified as the property of the alleged owner, the conviction could not be sustained. Smith v. State, 335.

7. Where, upon trial of theft, the testimony was conflicting, but sufficient to sustain the conviction, there was no error. Staha v. State, 356.

8. Where, upon trial of theft by fraudulent conversion of a check, the evidence sustained the conviction under a proper charge of the court, and the argument of State's counsel was not of such character to authorize a reversal, there was no error. Nesbitt v. State, 374.

9. Where a conviction of theft of wire was supported by the evidence, there was no error. Skinner v. State, 488.

10. Upon trial of theft, there was no error in admitting evidence to identify the alleged stolen belting by the way it had been mended. McGee v. State, 580.

Theft from Person.

1. Where, upon trial of theft from the person, the evidence was sufficient to sustain the conviction, there was no error. Brooks v. State, 366.

2. Where, upon trial of theft from the person, the evidence sustained the conviction, there was no error. Jones v. State, 447.

Theft of Cattle.

1. Where it was shown that the defendant took the alleged animal from its accustomed range, tied it in the woods, and afterwards went out and butchered it, the conviction for theft was sustained. Powers v. State, 214.

2. Upon trial of theft of cattle, there was no error in permitting the State on cross-examination of defendant's witness to show that the head of cattle he testified about was the one which defendant claimed to have raised, etc. Webb v. State, 413.

3. Upon trial of theft of cattle, there was no error in the court's refusal to charge the jury that if they believed that if the alleged stolen animal was one of the animals described in the bill of sale from defendant to the party injured, to acquit defendant; the evidence showing that one of the alleged animals was positively identified as one of the alleged stolen animals. Powers v. State, 494.

Theft of Hog.

See opinion for facts held to be insufficient to sustain a conviction for theft of a hog. Matthews v. State, 639.

Theft of Horse.

1. Where, upon trial of theft of a horse, the evidence was insufficient to support the conviction, the verdict of guilty can not be sustained. La Fell v. State, 307.

2. Where, upon trial of theft of a horse, the evidence was circumstantial, but sufficient to sustain the conviction, there was no error. Lester v. State, 426.

3. Where defendant gave more than one explanation of his possession of the alleged stolen horse, the conflict in such statements could be considered by the jury and the conviction will not be reversed on appeal. Following Cabral v. State, 57 Texas Crim. Rep., 304, and other cases. Stephens v. State, 437.

4. Where, upon trial of theft of a horse as an accomplice, the court properly charged on accomplice testimony and the evidence was sufficient to sustain the conviction, there was no error. Bailey v. State, 474.

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Theft of Mules.

1. Where, upon trial of theft of two mules, the evidence sustained the conviction, there was no error. Meadows v. State, 116.

2. In the absence of bills of exception to the admission of testimony and objections to the refusal of requested charges, these matters can not be reviewed, and the evidence supporting the conviction, there is no error. Peck v. State, 490.

Theory of State.

Where the theory of the State's evidence was that the principal was employed by the accomplice to kill M and that the principal by mistake killed A, but this mistake was not charged in the indictment nor was the conspiracy to kill M charged in the indictment, the conviction could not be sustained. Cooper v. State, 405.

Threats. See Murder, 1; Self-defense, 2.

1. Where, upon trial of assault to murder, the court's charge on threats required the jury to believe that the threats were in fact made, the same was reversible error. Following Buckner v. State, 55 Texas Crim. Rep., 517. Bussey v. State, 98.

2. Where defendant objected to certain testimony of threats by defendant against deceased, but the bill of exceptions itself showed that such threats were made, there was no error. Mayhew v. State, 187.

3. Where, upon trial of murder, the evidence showed deceased was of a dangerous and desperate character, and had told defendant that she had killed one negro and that she purposed killing him, the court should have permitted defendant to show that deceased did kill another negro who was her own husband, although defendant had not shown that he was aware of this fact at the time the threat was made. Following Childers v. State, 30 Texas Crim. App., 160. Jones v. State, 216.

4. Where, upon trial of murder, the declarations of the defendant showed that he referred to deceased when he made the threat that he was going to kill someone, there was no error in admitting same in evidence. Following Godwin v. State, 38 Texas Crim. Rep., 466. McKelvey v. State, 538.

Transcript.

1. See opinion suggesting legislation with reference to filing transcript in the Appellate Court. Gould v. State, 250.

2. See opinion showing that the transcript was unnecessarily voluminous. A record on appeal should present the real issues in the case. Wilson v. State, 432.

Transfer of Indictment.

Where the transfer of the indictment from one court to the other was made when the court to which the indictment was referred had the legal authority to acquire jurisdiction thereof, and the law authorized the filing of the papers in that court, it assumed jurisdiction, and it was not necessary to the legal existence of said court that a term under it should have been held, the Act creating said court being effective at the time the papers were filed. Johnson v. State, 123.

Trespasser.

Upon trial of murder, there was no error in permitting the State's witness to testify that he heard defendant say two days prior to the homicide that he had authorized deceased and others to pick the cotton in dispute, to show he was not a trespasser. Bogue v. State, 656.

Two Sales. See Pursuing Occupation, 2.

Uncommunicated Threats.

Where, upon trial of murder, the evidence did not raise the issue of uncommunicated threats, there was no error in the court's failure to charge thereon. Salmon v. State, 506.

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Undisclosed Motive.

Where, upon trial of aggravated assault, the court permitted the alleged assaulted party to testify that a few moments before the difficulty, he put his pistol in his pocket on account of the information he had received from the clerk of the hotel with reference to defendant—of all of which defendant had no knowledge, the same was reversible error. Ponder v. State, 654.

Unknown Fact. See Variance.

Unrecorded Brand.

Where the unrecorded brand was not relied on to prove ownership, and the identity of the animal alleged to have been stolen was proved by other testimony, there was no error in the court's failure to instruct the jury as to the purpose for which such brand is admitted in evidence. Powers v. State, 214.

Unwilling Witness. See Leading Question, 2.

Use of Deadly Weapon. See Presumption, 4.

Use of Intoxicating Liquors. See Intoxication no Defense.

Vagrancy. See Other Offenses, 2.

Where, upon trial of vagrancy, testimony of an attempt at bribery with which defendant was not shown to have had any connection or knowledge was inadmissible. Davis v. State, 251.

Value.

1. Where the uncontroverted evidence showed that the money alleged to have been stolen was over the value of fifty dollars, a complaint that the court's charge assumed the value of the property to have been proven, there was no error, besides, the court's charge was not subject to such criticism. Lane v. State, 65.

2. Where the alleged stolen belting was identified, there was no error in showing by experienced gin men the value thereof. McGee v. State, 580.

Variance. See Embezzlement; Name of Injured Party, 1.

1. Where the indictment alleged that the defendant received the alleged stolen property from some person to the grand jurors unknown, and the evidence showed that the grand jury knew or could have known from whom defendant received the property, the variance was fatal. Following Jorasco v. State, 6 Texas Crim. App., 238, and other cases. Williams v. State, 163.

2. Where, upon trial of forgery, the grand jury did not describe in the indictment the alleged forged instrument as it was in fact given and as they could have described it by fair and reasonable diligence, the indictment was not sufficient, and there was therefore a variance between the allegation and the instrument forged, and the judgment must be reversed and the cause remanded. Collum v. State, 165.

Venue. See Charge of Court, 3; Jurisdiction, 4; Theft.

1. Where the evidence shows no venue and a contest is made on that point as required by law, it is not decided that in every instance the want of evidence showing venue must be shown by a bill of exceptions. Lane v. State, 65.

2. Under Article 245, Revised Code Criminal Procedure, where property is stolen in one county and carried off by the offender to another, he may be prosecuted either in the county where he took the property or in any other county through or into which he may have carried the same. Following Pearce v. State, 50 Texas Crim. Rep., 507, and other cases. Rogers v. State, 84.

3. Where, upon trial of embezzlement, the court's charge specifically required the jury to believe beyond a reasonable doubt that the defendant fraudulently embezzled the alleged money in the county of the prosecution, the same was sufficient. Poteet v. State, 322.

4. Upon trial of theft of mules as bailee, where the court properly

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Venue—Continued.
charged that if the defendant obtained possession then and there and fraudulently converted same, etc., to find him guilty, there was no reversible error on the ground that the words, "then and there," did not sufficiently instruct the jury on the venue of the case. Peck v. State, 490.

5. Where, upon trial of playing dice, the venue was clearly proved, there was no error; besides, in the absence of a bill of exceptions, the question of venue could not be passed upon on appeal. Scott v. State, 616.

Verdict. See Words and Phrases, 3.

1. Where, upon trial of aggravated assault, the court's charge limited the jury to the consideration of a simple assault only, and the verdict assessed a fine of five dollars, there was no uncertainty as to the degree of which the jury found defendant guilty, and there was no error because the verdict did not specify of what degree they convicted defendant. Carpenter v. State, 331.

2. Where the court only submitted manslaughter of which defendant was convicted, the verdict was sufficiently definite to base a judgment thereon. Clements v. State, 369.

3. Where the appellant complained that the word, "at," between the words, "punishment" and "twenty," was omitted, the verdict was, nevertheless, sufficient. Garrett v. State, 462.

4. Where the verdict used the word "jurors" instead of the word "jury," the same was, nevertheless, sufficient under the statute. Skinner v. State, 488.

Verdict by Lot.

1. Where the verdict was not arrived at by lot or chance, but was a compromise of differences arising between the jurors, it was not a verdict by lot and valid. Alexander v. State, 23.

2. Where the trial court heard testimony on defendant's motion for new trial on the ground that the verdict was arrived at by lot and found against the defendant, there was no error. Alsup v. State, 117.

3. Where the motion for new trial contended that the verdict of the jury was reached by lot, but was not supported by affidavit, the same need not be considered; besides, there was no error in overruling it. Following Pruitt v. State, 30 Texas Crim. App., 156, and other cases. Salmon v. State, 506.

4. Where the court instructed the jury that they could not reach a verdict by lot or chance, etc., defendant's contention that he should have instructed the jury that if they found defendant guilty, they could not arrive at a verdict by lot, etc., was untenable, and the court's charge was not on the weight of the evidence when read in connection with other portions of the charge. McKelvey v. State, 538.

Voluntary Use of Intoxicants.

Upon trial of murder, where there was no evidence that defendant claimed that he was insane from the recent voluntary use of intoxicating liquors, there was no error in the court's failure to charge upon art. 41, Penal Code; besides, the complaint in the motion for new trial on this ground was entirely too general, and no special charge having been requested and no bill of exceptions reserved at the proper time. Following Byrd v. State, 69 Texas Crim. Rep., 35. Ex parte Evers, 29 Texas Crim. App., 539, and other cases. Lucas v. State, 269.

Waiver.

Where, upon trial of pursuing the occupation of selling intoxicating liquors in local option territory, the defendant waived the reading of the orders of the Commissioners Court pertaining to local option being in force in the county of the prosecution and admitted their introduction in evidence, he could not claim, in his motion for rehearing in this court, that there was no evidence to show that local option was in force in said county; especially, where the court's charge assumed such fact and no objection was made thereto in motion for new trial. Pierce v. State, 175.

Waiver of Service. See Copy of Indictment.

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Want of Consent.

1. Where the alleged stolen property was community and the ownership alleged in the wife and want of consent shown on her part, there was no error. Lane v. State, 65.

2. In a prosecution for burglary, the indictment need not allege that entry was without the consent of the owner, and the State is not required to prove the want of consent of persons not named in the indictment. Alsup v. State, 117.

3. The fact that defendant offered to let prosecutor have an insurance policy on what he owed him would not tend to show whether or not he had authority to use the alleged check at the time he appropriated the same. Nesbitt v. State, 374.

Want of Diligence. See Continuance; Newly Discovered Evidence.

1. Where the application for continuance did not show what defendant expected to prove by the absent witnesses and did not show any diligence, the same was correctly overruled. Davis v. State, 86.

2. Where defendant's motion for continuance showed a want of diligence in applying for process or taking the depositions of the absent witness while out of the State, and besides, the testimony of the absent witness was admitted in evidence by another witness and the only disputed fact was not probably true, there was no error in overruling the motion. Following Wilkins v. State, 35 Texas Crim. Rep., 525, and other cases. Boseley v. State, 100.

3. Where defendant's application, besides showing a want of diligence, did not show the materiality of the testimony, the same was correctly overruled. Stephens v. State, 379.

Warning.

Where the written statement of defendant before the grand jury did not show that he was duly warned, the same was inadmissible in evidence on his trial, and an independent statement of another could not be used against him to supply the defect in defendant's statements or confessions. La Fell v. State, 307.

Weight of Evidence.

1. Where, upon trial of unlawfully carrying a pistol, the charge of the court applied the law to the admitted facts, the same was not on the weight of the evidence. Following Cordova v. State, 50 Texas Crim. Rep., 353, and other cases. Crain v. State, 55.

2. Where, upon trial of aggravated assault, the evidence raised the issue ot self-defense, a charge of the court eliminating such defense was reversible error. Parish v. State, 254.

3. Where the court's charge was but a statement of a proposition of law if the jury found a given state of facts, the same was not on the weight of evidence. Condron v. State, 513.

When New Trial Should be Granted. See New Trial.

Whole Charge. See Charge of Court, 12; Murder, 14; Reasonable Doubt, 3.

Withdrawal of Plea.

While the defendant has the right to withdraw his plea of guilty at any time before the retirement of the jury, yet this question, under Article 938, Code Criminal Procedure, can not be raised for the first time in the Court of Criminal Appeals where the defendant has not reserved same by bill of exceptions or motion for new trial in the court below. Distinguishing Noble v. State, 50 Texas Crim. Rep., 581, 99 S. W. Rep., 996. Alexander v. State, 23.

Witness. See Age of Witness; Bias of Witness; Bribing Witness; Codefendant; Contradicting Witness; Credibility of Witness; Defendant as a Witness; Fining Witness; Indorsement; Recalling Witness.

Where defendant sought a continuance or postponement of the case until other parties could be tried who were indicted for separate and distinct

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Witness—Continued.
offenses, and who could have been introduced as witnesses before they were tried, there was no error in overruling the motion. McKelvey v. State, 538.

Woman of Loose Virtue. See Assault to Rape, 3.

Words and Phrases. See Alibi, 3; Indictment; Manslaughter, 13; Venue, 4; Verdict, 3, 4; Verdict by Lot, 4.

1. Where, upon trial of forgery, the indictment followed approved precedent, the fact that "A. D." was left out just before the year "1911," was immaterial and the indictment was sufficient. Whorton v. State, 1.

2. Grammatical errors will neither vitiate a law nor an indictment, and where the word "would" was left out, yet the whole count in the indictment showed that this was but a grammatical error, there was no reversible error. Following Murray v. State, 21 Texas Crim. App., 620, and other cases. Thompson v. State, 31.

3. Where, upon trial of burglary, the verdict of the jury misspelled the words "guilty and assess," but there could be no misunderstanding as to the meaning of the verdict, there was no reversible error. Alsup v. State, 117.

4. Upon trial of unlawfully and willfully disturbing religious worship, there was no error on the ground that the information used the words "religious worship' and the charge of the court, the words, "religious purposes." Following Yarborough v. State, 19 Texas, 162. Laird v. State, 553.

Worship. See Disturbing Religious Worship.

Written Instrument. See Forgery, 2.

Ex. y. M.
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